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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 67

THOMAS PAPER STOCK COMPANY, ET AL.,
PETITIONERS;

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

PETITION FOR CERTIORARI FILED APRIL 26, 1945

CERTIORARI GRANTED JUNE 4, 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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[fol. 1]

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 159

THOMAS PAPER STOCK COMPANY, et al., Complainants,

v.

CHESTER BOWLES, Price Administrator, Respondent

Transcript of Proceedings Before the Price Administrator

PROTEST FILED WITH THE SECRETARY OF THE OFFICE OF PRICE ADMINISTRATION ON JUNE 15, 1944

Joint Protest and Petition of Amendment of Thomas Paper Stock Company, an Illinois Corporation, and Alvin E. Sandroff, President of the Thomas Paper Stock Company, Against General Maximum Price Regulation No. 30, Issued November 23, 1942

(a) 1. Name of protestants: Thomas Paper Stock Company, and Alvin E. Sandroff, President of the Thomas Paper Stock Company.

2. Nature of business: Purchase and sale of waste paper.

3. Manner in which protestants are subject to the Maximum Price Regulation No. 30: Certain waste paper products purchased and sold by the Thomas Paper Stock Company and by Alvin E. Sandroff, on behalf of Thomas Paper Stock Company are within the definitions of the various grades and classifications of waste paper set out in Maximum Price Regulation No. 30. Protestants also deal in unsorted waste paper, which is purported to be regulated in Section 1347.14 Appendix A (d) of said regulation.

(b) 1. Name and post office address of the person filing the protest on behalf of the protestants: Alvin E. Sandroff, [fol. 2] President of the Thomas Paper Stock Company, 860 West Evergreen, Chicago, Illinois, on behalf of himself and Thomas Paper Stock Company.

2. Name and post office address of the persons to whom all communications from the OPA relating to the protest

shall be sent: Alvin E. Sandroff, 860 West Evergreen, Chicago, Illinois.

(c) Protestants object to Maximum Price Regulation No. 30 on the following grounds: 1. The effect of the Taft Amendment to the Commodity Credit Corporation Act (Pub. Law 151—78th Cong., Ch. 241—1st Sess.) which was enacted July 16, 1943, is to prohibit the Price Administrator from setting a maximum price for unsorted waste paper in the manner and upon the basis on which it was set in Maximum Price Regulation 30. Therefore, Maximum Price Regulation No. 30 in so far as it applies to unsorted waste paper, was repealed and voided as of July 16, 1943. The pertinent part of said amendment is section 2 (j) of the Emergency Price Control Act which reads as follows:

> Sec. 5. (a) Section 2 of the Emergency Price Control Act of 1942, as amended, is hereby amended by adding at the end thereof the following new subsection:
>
> "(j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government Agency."

[fol. 3] Subdivision (4) of the above amendment unequivocally prohibits the Price Administrator from setting maximum prices unless the specification or standards involved were in general use in the trade or industry affected or their use required by another governmental agency. The clause is all inclusive, and provides for no exceptions. A question may then be raised as to whether the follow-

ing provision of Maximum Price Regulation No. 30 is authorized by any of the exceptions to the prohibition of subdivision (4) of the Taft Amendment?

> (d) Maximum prices for unsorted wastepaper. Unsorted wastepaper, which contains two or more unsorted grades, shall not be subject to the maximum prices prescribed by this Maximum Price Regulation No. 30, in the event that such paper is sold to a purchaser who warrants in writing to the seller that he will not use such paper as a consumer thereof, but will sort and grade it for resale into (1) grades listed in this Maximum Price Regulation No. 30, or (2) specialty grades described in paragraph (c) of this § 1347.14, or (3) paper which does not constitute wastepaper as defined in § 1347.11, and that he will sell such paper so sorted and graded at prices no higher than the maximum prices prescribed for such grades by this Maximum Price Regulation No. 30, or by any other applicable maximum price regulation or price schedule. If, however, such unsorted paper is sold to a consumer thereof, the price therefor shall not exceed the maximum price prescribed by this Maximum Price Regulation No. 30 for "No. 1 mixed paper". The warranties required from the purchaser must be kept in the seller's records in the manner provided in § 1347.10. Maximum Price Regulation No. 30, Section 1347.14 OPA subdivision (d).

It is clear that specification and standard for unsorted wastepaper set out in this provision was not one which had previously been promulgated and its use "lawfully required by another Government Agency". Thus the only remaining exception in subdivision (4) of the Amendment is where the said specification and standard had been "in [fol. 4] general use in the trade or industry affected". However, the Price Administrator himself has conclusively eliminated any doubt as to whether unsorted wastepaper is within this exception by his Supplementary Statement of Consideration of September 11, 1943 (a copy of which is attached and marked Exhibit A). Following the language of the statute he stated that—

> In one respect, Maximum Price Regulation No. 30 may be deemed to effectuate a standardization not here-

> tofore known in the industry. Section 1347.14 (b) provides that the maximum price for unsorted paper sold to a consumer shall not exceed the maximum price prescribed by the regulation for "No. 1 mixed paper." This *was not the practice in the industry prior to price control.* Prior to price control, unsorted paper was rarely sold to a consumer, but whenever it was the price varied depending upon the materials contained in the lot of unsorted paper. [Italics ours.] Supplementary Statement of Considerations, Sept. 11, 1943.

Thus, under Section 2 (j) of the Amendment, which is set out above, the Price Administrator from July 16, 1943 was prohibited from setting a maximum price for unsorted waste paper.

2. Protestants further state that subdivision (3) of the Taft Amendment does not authorize the setting of a maximum price of a commodity within the prohibition of subdivision (4), but that even if it is assumed without admitting that such authority is granted by subdivision (3), such maximum price for unsorted waste paper was not effective till September 11, 1943, if effective at all. For if there is any such authority in the subdivision (3), its exercise must be conditioned upon a determination by the Price Administrator "that no practicable alternative exists for securing effective price control with respect to such commodity", and hence from the date of the enactment of the Taft Amendment to the date of such an administrative determination, there was no maximum price regulation for unsorted waste paper. The Supreme Court of the United States made it clear that such an administrative determination is a condition precedent to the existence of the administrative order, [fol. 5] in *Panama Refining Company* v. *Ryan*, 293 U. S. 388, when the court spoke as follows (p. 431):

> But if from the extremely broad description contained in that section and the widely different matters to which the section refers, it were possible to derive a statement of prerequisites to the President's action under § 9 (c), *it would still be necessary for the President to comply with those conditions and to show that compliance as the ground of his prohibition.* To hold that he is free to select as he chooses from the many and various objects generally described in the first

section, and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power.

We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power. *If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and if that authority depends on determinations of fact, those determinations must be shown.* As the Court said in *Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 59, 67 L. ed. 124, 130, 43 S. Ct. 51:

"In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. *When,* [fol. 6] *therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this.*" Referring to the ruling in the *Wichita R. & Light Co.* Case, the Court said in *Mahler* v. *Eby*, 264 U. S. 32, 44, 68 L. ed. 549, 556, 44 S. Ct. 283: "We held that the order in that case made after a hearing and ordering a *reduction was void for lack of the express finding in the order.* We put this conclusion not only on the language of the statute but also on general principles of constitutional government." We cannot regard the Presi-

dent as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation. [Italics ours.]

The Protestants' question whether the Supplementary Statement of Considerations issued by the Price Administrator on September 11, 1943, was a sufficient administrative determination to invoke subdivision (3), but assuming without admitting that it was sufficient, the existence of the regulation would date from September 11, 1943, and not before. Thus since the regulation became effective if effective at all on September 11, 1943, an imposition of the Maximum Price Regulation No. 30 on unsorted Waste Paper, between July 16, 1943, and September 11, 1943, would be contrary to the decision in *Panama Refining Company* v. *Ryan*, 293 U. S. 388, and in so far as criminal penalties are involved, would be a direct violation of the Constitutional prohibition against *ex post facto* laws.

(d) Statement of facts in support of objections: Prior to price control unsorted waste paper was bought and sold in terms of the various types of paper the particular shipment [fol. 7] contained, since then as well as now no two shipments of unsorted waste paper were alike (the variation being greater where different sources of supply are involved). In other words, when a buyer and seller were setting a price for a particular lot of unsorted waste paper, the determination of the price was dependent upon the various grades that made up the total of the lot, and such grades and their respective qualities were approximately known to both parties. This designation of a particular lot of unsorted waste paper by the grades of which it is made up, was equivalent to the unsorted waste paper being described in terms of standards or specifications, since grades are admittedly standards or specifications.

This was all changed by Maximum Price Regulation No. 30, which provided that, regardless of its content, unsorted waste paper was to be sold at the same price as No. 1 Mixed Paper. The result of setting this price without reference to the contents of the particular lot, except to require that it conform to the specification or standard

of containing two or more unsorted grades of waste paper, was to make unsorted waste paper *a complete grade within itself*. This grade was entirely new in the industry, and therefore the Price Administrator in his Supplementary Statement of Considerations of September 11, 1943 (Exhibit A) pointed out that a new standardization had taken place in the industry, in the following language:

> In one respect, Maximum Price Regulation No. 30 may be deemed to effectuate a *standardization not heretofore known in the industry*. Section 1347.14 (b) provides that the maximum price for unsorted paper sold to a consumer shall not exceed the maximum price prescribed by the regulation for "No. 1 mixed paper." This *was not the practice in the industry prior to price control*. Prior to price control, unsorted paper was rarely sold to a consumer, but whenever it was the price varied depending upon the materials contained in the lot of unsorted paper. [Italics ours.] OPA Service P. 42: 175.

[fol. 8] This regulation imposed an unfair burden on the Protestants, for while there was certain low grade unsorted waste paper obtained from office buildings, department stores, etc., which was used to manufacture box board and paper board, and which was not usually worth more than No. 1 Mixed Paper, Protestants' business was made up in large part of dealing in printer's unsorted waste paper which was of a very high quality. This printer's paper was made up of clipping of new paper off the cutting machines, and consisted of unbleached and bleached sulphite and soda pulp, and was manufactured into book and bond paper, and hence worth many times more than No. 1 Mixed Paper.

The purpose of the Taft Amendment to safeguard against such unfair burdens arising from pricing based upon new standardization in the industry, was ignored when in November of 1943, the Protestants were indicted by the United States primarily on the grounds of alleged violation of Maximum Price Regulation No. 30 as applied to unsorted waste paper, all of said alleged violations occurring between July 16, 1943 and September 11, 1943. Since the Taft Amendment repealed and voided Maximum Price Regulation No. 30 as so applied, said indictment is based on alleged violation of a non-existing regulation.

(e) Statement of relief requested: Protestants request in the alternative either:

1. That the repeal and voiding of Maximum Price Regulation No. 30 by the Taft Amendment was applied to unsorted waste paper be specifically expressed in said regulation by amendment thereto to provide as follows:

> All sales of unsorted waste paper occurring on or after July 16, 1943, are not subject to the provisions of this regulation.

2. Or that the repeal and voiding of Maximum Price Regulation No. 30 as applied to unsorted waste paper by the Taft Amendment for the period extending from the date of the Taft Amendment to the date of the Statement of Considerations by the Price Administrator be specifically expressed in said regulation by amendment thereto to provide as follows:

> [fol. 9] All sales occurring in the period beginning on July 16, 1943 and extending to September 11, 1943, are not subject to the provisions of this regulation.

(f) Time when grounds of protest arose: Since this protest is based upon a repeal of Maximum Price Regulation No. 30 by the Taft Amendment, the grounds for the protest first arose on July 16, 1943, the date of the Amendment, which is more than sixty days subsequent to the date of the issuance of the Maximum Price Regulation No. 30 on November 23, 1942. Prior to the recent ruling of the Emergency Price Control Act in *R. E. Schanzer, Inc.* v. *Bowles*, 141 F. (2) 262, the Protestants did not submit any protest because the OPA had taken the position that there was a sixty day limitation on the filing of a protest based upon new grounds arising subsequent to the issuance of the regulation. However, it is the position of the Protestants that under the *Schanzer* case, the OPA's sixty day limitation on new grounds is not binding and hence this protest is now timely.

(g) Statement of good faith: The undersigned, Alvin E. Sandroff, being first duly sworn on oath, says that the

statements above made are prepared in good faith and the facts alleged are true to the best of his knowledge.

Alvin E. Sandroff.

Subscribed and sworn to before me this 14th day of June 1944. Rebecca M. Smith, Notary Public, D. C. (Seal.)

[fol. 10] EXHIBIT "A" TO PROTEST

SUPPLEMENTARY STATEMENT OF CONSIDERATIONS

In the light of the amendment (Pub. Law 151, 78th Cong.) adding to the Emergency Price Control Act of 1942 a provision (paragraph (j) of Section 2) which restricts the power of the Price Administrator to make use of standards in price control, Maximum Price Regulation No. 30 has been re-examined. Based upon this examination, the Price Administrator has determined, that the regulation complies with that amendment. As far as possible, Maximum Price Regulation No. 30 fixes maximum prices for different kinds, classes or types of wastepaper only in terms of specifications or standards which prior to the issuance of the regulation were in general use in the wastepaper industry. Insofar as it may *not* do so, the Price Administrator finds the variances essential to price control in this field.

Maximum Price Regulation No. 30 establishes dollar and cent maximum prices for thirty-two grades of wastepaper, and provides that the maximum price for any unlisted grades shall be a price in line with the maximum price stated in the regulation for the nearest related grade. The specifications of the thirty-two listed grades were arrived at after extensive conferences with producers and consumers of wastepaper. Grade-listings and specifications in all available trade journals dealing with wastepaper were also examined. As a result of these conferences and studies, grades were established and defined in accordance with industry practices.

It must be conceded that in an industry of this type, absolute certainty with respect to the prevalence of any particular standard would not be possible, particularly since industry practices in various sections of the country, and indeed with respect to individual companies, are by no

[fol. 11] means uniform. To the extent that any specifications stated in Maximum Price Regulation No. 30 deviate from the exact specifications which were in general use in the trade or industry affected, the Price Administrator finds there was not practicable alternative for securing effective price control with respect to the particular grades involved. Regardless of any unclarity in industry practices in this respect, certain specifications and standards of general applicability are essential to price control. Maximum prices cannot be established for an infinite number and variety of grades, kinds, classes or types of wastepaper. Representatives of the industry are in agreement that the specifications and standards established by this regulation represent the best possible averaging of general industry practices.

The fact that certain grades of wastepaper are not listed and must be priced under a separate pricing procedure does not effectuate any standardization. The listed grades constitute all of the standard grades, and the industry is in complete agreement that no standard grade has been omitted from that list. It was necessary to provide a separate procedure for the pricing of unlisted grades because sales of such unlisted grades are so irregular that there would be no established market prices and differentials upon which maximum dollar and cent prices could be based.

In one respect, Maximum Price Regulation No. 30 may be deemed to effectuate a standardization not heretofore known in the industry. Section 1347.14 (b) provides that the maximum price for unsorted paper sold to a consumer shall not exceed the maximum price prescribed by the regulation for "No. 1 mixed paper". This was not the practice in the industry prior to price control. Prior to price control, unsorted paper was rarely sold to a consumer, but whenever it was the price varied depending upon the materials contained in the lot of unsorted paper. Maximum Price Regulation No. 30 penalizes sellers upon their sales of unsorted paper to a consumer. This provision affects a very small percentage of the industry's total volume and is absolutely necessary in order to secure effective price control with respect to wastepaper. Since every [fol. 12] lot of unsorted paper is always of a different value from any other lot of unsorted paper, it would be impossible to establish a fair price for sales of unsorted

paper. To exempt sales to consumers of unsorted paper would have the result that only those consumers who were able to sort their own paper would be able to obtain any supplies, thus giving such consumers an unfair advantage. Both consumers and dealers are in agreement that it is necessary to provide this penalty price upon sales of unsorted paper to consumers.

In light of the foregoing, the Price Administrator finds that except for comparatively minor exceptions, Maximum Price Regulation No. 30 fixed minimum prices for different kinds, classes, or types of wastepaper only in terms of exceptions or standards, which prior to the issuance of the regulation, were in general use in the wastepaper industry, and, that with respect to any exception, no practicable alternative exists for securing effective price control over sales of wastepaper. The Price Administrator finds, also, that insofar as Maximum Price Regulation No. 30 effectuates standardization in the wastepaper industry, such standardization is the only practicable method of securing effective price control with respect to the wastepaper involved. In light of all of the foregoing, the Price Administrator finds that Maximum Price Regulation No. 30 complies with paragraph (j) of Section 2 of Emergency Price Control Act of 1942, as amended.

Issued this 11th day of September 1943.

[fol. 13] BEFORE OFFICE OF PRICE ADMINISTRATION

SUPPLEMENTAL EVIDENCE SUBMITTED IN SUPPORT OF PROTEST

Supplemental Evidence Submitted in Support of Joint Protest and Petition of Amendment (Filed June 15, 1944) of Thomas Paper Stock Company, an Illinois Corporation, and Alvin E. Sandroff, President of the Thomas Paper Stock Company, Against General Maximum Price Regulation No. 30, Issued November 23, 1942

(a) 1. Name of protestants: Thomas Paper Stock Company, and Alvin E. Sandroff, President of the Thomas Paper Stock Company.

2. Nature of Business: Purchase and sale of waste paper.

3. Manner in which protestants are subject to the Maximum Price Regulation No. 30: Certain waste paper

products purchased and sold by the Thomas Paper Stock Company and by Alvin E. Sandroff, on behalf of Thomas Paper Stock Company are within the definitions of the various grades and classifications of waste paper set out in Maximum Price Regulation No. 30. Protestants also deal in unsorted waste paper, which is purported to be regulated in Section 1347.14 Appendix A (d) of said regulation.

(b) 1. Name and post office address of the person filing the protest on behalf of the protestants: Alvin E. Sandroff, President of the Thomas Paper Stock Company, 860 West Evergreen, Chicago, Illinois, on behalf of himself and Thomas Paper Stock Company.

2. Name and post office address of the persons to whom all communications from the OPA relating to the protest shall be sent: Alvin E. Sandroff, 860 West Evergreen, Chicago, Illinois.

(c) Submission of supplemental evidence: Permission is hereby requested of the Price Administrator to present the following supplemental evidence which is to be added to the section entitled, "(d) Statement of Facts in Support of Objections" of the Protest filed June 15, 1944. It is sub- [fol. 14] mitted that the granting of said permission should not unduly delay the completion of the proceedings on the Protest.

As pointed out in the Protest, prior to Maximum Price Regulation No. 30, unsorted waste paper was bought and sold in terms of the various types of waste paper the particular shipment contained. This designation of the buying and selling in terms of the grades contained in the shipment was equivalent to unsorted waste paper being described in terms of standards and specifications, such grades being admittedly standards or specifications.

Until Amendment No. 6 to Maximum Price Regulation No. 30 was issued, in December, 1943, this procedure was retained under Maximum Price Regulation No. 30 where the purchase of unsorted waste paper was not for consumption but for resale upon sorting and grading. When such a purchase was involved, Maximum Price Regulation No. 30 expressly eliminated the ceiling of the price of No. 1 Mixed Paper for unsorted waste paper, and thereby made possible a designation of the purchase in terms of the standards and specifications of what it contained. An example of such a

purchase is the Proposal for Purchase of Waste Paper from the United States Government Printing Office, a photostatic copy of which is set out below.

It is to be noted that there is a complete itemization of all the waste paper involved in Items 1 to 10 inclusive, and then a totaling of all the items in 11, the total being labeled as unsorted waste paper. It is to be noted also, that as set out in small print under Item 11, the said Item 11 is not an additional item, and that bids will only be accepted on Items 1 to 10 as a unit, only on Item 11 as a unit.

Thus, as opposed to the purchase set out above, when there is an imposition of a ceiling price which is the same as No. 1 Mixed Paper on a shipment of unsorted waste paper, the shipment no longer is designated in terms of the grades of which it is made up since the price remains the same regardless of the grades involved. Hence, as pointed out on page 7 of the Protest, unsorted waste paper becomes a complete new grade or standard and specification within [fol. 15] itself, and under Clause (4) of the Taft Amendment, the Price Administrator is prohibited from authorizing any order fixing a maximum price for unsorted waste paper.

[fol. 16]

PROPOSAL FOR PURCHASE OF PAPER SHAVINGS, ETC.

U. S. GOVERNMENT PRINTING OFFICE
Office of the Public Printer

Washington, D. C., July 12, 1943.

Sealed proposals will be received at this Office until 2 p. m., July 19, 1943, and immediately thereafter opened, for the purchase of the Paper Shavings, Waste Paper, etc., that may accumulate at the Government Printing Office during the period ending June 30, 1944.

The following is the classification:

G. P. O. Item	Description	Estimated Quantity *Pounds*
1 OPA 1	No. 1 mixed paper; consists of waste paper which does not have the uniform or distinctive qualities for classification as any other grade	17,910,000
2 OPA 25	No. 1 mixed ledger (colored ledger); consists of ledger, bond, and writing paper, white and colored, which contain no more than 2% outthrow. GPO classification will contain considerable soft white shavings (OPA 17) composed of book, mimeograph and clean white waste papers free from ground wood	950,000
3 OPA 14	No. 1 hard white shavings (lesser quality); consists of ivory monotype keyboard paper in rolls; free from ground wood	100,000
4 OPA 10	New manila envelope cuttings; consists of postal card bristol trimmings and clean waste, trimmings from tabulating cards rolls; all free from ground wood	440,000

5 OPA 12	Tabulating cards free from ground wood (contains colored cards); consists of new or used printed manila and colored cards, free from ground wood, which have been manufactured for use in automatic tabulating machines		100,000
6 OPA 8	White blank news; consists of unprinted cuttings or sheets of white newspaper		300,000
7 OPA 21	No. 1 ground wood flyleaf shavings; consists of the trim of magazines, catalogs and similar printed matter, not limited with respect to ground wood, and may contain bleed of cover and insert stock, but be free from beater dyed papers, solid or other color printing and coated stock		200,000
8 OPA 23	Mixed books; consists of discarded publications; bound in paper, or boards covered with leather, cloth or paper. (Such portions of these publications must be mutilated by the contractor before removal from the premises as may be required by the Public Printer and will not be baled or sacked by the Government)		700,000
9 OPA 24	No. 1 heavy books and magazines; consists of used and over-issue books and magazines, stitchless stock, and similar printed matter		500,000
10 OPA 32	Mill wrappers; consists of paper used as outside wrappers from rolls, bundles and skids of finished stock, free from oiled and tarred papers		2,000,000
11	Unsorted waste paper, consisting of two or more unsorted grades		23,300,000

Item 11 is the total waste of the Government Printing Office and should not be considered as an additional item. Bids will be considered on Items 1-10 as a unit and Item 11 as a unit. The contractors' price on Item 11 shall reflect the fact that this unsorted waste consists of waste from all grades of paper purchased in quantities shown in paper schedule dated July 1, 1943, attached.

Bids on Item 11 not subject to maximum price regulations as prescribed by Maximum Price Regulations No. 30; contractor must submit warranty to the Government Printing Office that he will not use such paper as a consumer, but will sort and grade the paper for resale into grades listed in Maximum Price Regulations No. 30 or special grades described in Paragraph C of Paragraph 1347.14, or paper which does not constitute waste paper as described in Paragraph 1347.11, and that he will sell such paper so sorted and graded at a price not higher than the maximum price prescribed for such grade by Maximum Price Regulations No. 30, or by any other applicable maximum price regulations or price schedules. If this paper is not sorted by the contractor, the price therefor shall not exceed the maximum price prescribed by Maximum Price Regulations No. 30 for "No. 1 Mixed Paper."

Bids offering to purchase at prices in excess of the maximum OPA prices will be regarded as having been quoted at the maximum price.

Each bidder must furnish with his bid a bond in an amount equal to 20 percent of the total amount of the bid guaranteeing that he will enter into a contract and perform thereunder if the successful bidder. Bonds of unsuccessful bidders will be returned immediately upon award of the contract.

Statement of charges will be issued by this Office not later than the 5th of the month following shipments and payment in full therefor must be made not later than the last day of the month in which bill is rendered. In case payment is not made within the time specified, it is distinctly understood and agreed that liquidated damages will be charged contractor at rate of $3 for each and every calendar day payment is delayed beyond the last day of the month in which bill is rendered. In——

(d) Statement of good faith: The undersigned, Alvin E. Sandroff, being first duly sworn on oath, says that the statements above made are prepared in good faith and the facts alleged are true to the best of his knowledge.

Alvin E. Sandroff.

Subscribed and sworn to before me this 29th day of June 1944. H. S. Galligan, Notary Public. (Seal.)

[fol. 17] Before the Office of Price Administration

Docket No. 1030-9-P

In the Matter of Thomas Paper Stock Company, Protestants

Order Denying Protest

On June 15, 1944, Thomas Paper Stock Company and Alvin E. Sandroff, president of Thomas Paper Stock Company, 860 West Evergreen, Chicago, Illinois, filed a protest against the provisions of Section 1347.14(d) of Maximum Price Regulation No. 30—Wastepaper. On June 29, 1944, Protestants submitted additional evidence in support of their protest.

Due consideration has been given to the protest, and an opinion in support of this order has been issued simultaneously herewith and has been filed with the Secretary of the Office of Price Administration.

For the reasons set forth in the opinion, under the authority vested in the Price Administrator, and in accordance with the Emergency Price Control Act of 1942, as amended, and Revised Procedural Regulation No. 1, it is ordered that protest Docket No. 1030-9-P, be, and it hereby is, denied.

Issued and effective this 29th day of July, 1944.

(S.) James G. Rogers, Jr., Acting Administrator.

[fol. 18] BEFORE THE OFFICE OF PRICE ADMINISTRATION

Docket No. 1030-9-P

In the Matter of THOMAS PAPER STOCK COMPANY, Protestants

OPINION ACCOMPANYING ORDER DENYING PROTEST

On June 15, 1944, Thomas Paper Stock Company and Alvin E. Sandroff, president of Thomas Paper Stock Company, hereinafter called Protestants, 860 West Evergreen, Chicago, Illinois, filed a protest against the provisions of Maximum Price Regulation No. 30—Wastepaper. On June 29, 1944, Protestants submitted additional evidence in support of their protest.

Protestants object specifically to subdivision (d) of section 1347.14 of the regulation, relative to sales of unsorted wastepaper. That subsection reads:

> The maximum prices for sales of unsorted wastepaper to any person shall not exceed the maximum price prescribed by this regulation for "No. 1 mixed paper," regardless of the grades and quantity of each grade contained in such unsorted wastepaper.[1]

[1] The protest quotes the provision as it was before the amendment. However, Protestants' objections to the regulation apply equally to both versions of subsection (d). Prior to its amendment on December 28, 1943, the provision read: "*Maximum prices for unsorted wastepaper.*—Unsorted wastepaper, which contains two or more unsorted grades, shall not be subject to the maximum prices prescribed by this Maximum Price Regulation No. 30, in the event that such paper is sold to a purchaser who warrants in writing to the seller that he will not use such paper as a consumer thereof, but will sort and grade it for resale into (1) grades listed in this Maximum Price Regulation No. 30, or (2) specialty grades described in paragraph (e) of this § 1347.14, or (3) paper which does not constitute wastepaper as defined in § 1347.11, and that he will sell such paper so sorted and graded at prices no higher than the maximum prices prescribed for such grades by this Maximum Price Regulation No. 30, or by any other applicable maximum price regulation or price schedule. If, however, such unsorted paper is sold to a consumer thereof, the price therefor shall not exceed the maximum price prescribed by this Maximum Price Regulation No. 30 for 'No. 1 mixed paper.'"

[fol. 19] Protestants' objection to the above quoted provision is based on the so-called Taft Amendment to the Emergency Price Control Act of 1942, as amended, which reads as follows:

> Nothing in this Act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity; unless the Administrator shall determine, with respect to such standardization that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.

Protestants contend that the provision of the regulation under consideration violates this section in that it standardizes a commodity without a determination by the Administrator that there is no practicable alternative for securing effective price control with respect to the commodity, and that it fixes maximum prices for different kinds, classes, or types of a commodity described in terms of specifications or standards which were not, prior to the issuance of the regulation, in general use in the trade, or previously promulgated and their use lawfully required by another Government agency, within the terms of subsections (3) and (4).

Protestants further state that, even if the quoted provisions of the regulation are at present legal they became so only on September 11, 1943, with the issuance by the Administrator of a Supplemental Statement of Considerations. The following are the pertinent portions of that statement:

> In the light of the amendment * * * adding to the Emergency Price Control Act of 1942 a provision * * * which restricts the power of the Price Administrator to make use of standards in price control, Maximum Price Regulation No. 30 has been re-examined. Based upon this examination, the Price Administrator

[fol. 20] has determined that the regulation complies with that amendment. As far as possible, Maximum Price Regulation No. 30 fixes maximum prices for different kinds, classes or types of wastepaper only in terms of specifications or standards which prior to the issuance of the regulation were in general use in the wastepaper industry. Insofar as it may not do so, the Price Administrator finds the variances essential to price control in this field. * * *

It must be conceded that in an industry of this type, absolute certainty with respect to the prevalence of any particular standard would not be possible, particularly since industry practices in various sections of the country, and indeed with respect to individual companies, are by no means uniform. To the extent that any specifications stated in Maximum Price Regulation No. 30 deviate from the exact specifications which were in general use in the trade or industry affected, the Price Administrator finds there was no practicable alternative for securing effective price control with respect to the particular grades involved. Regardless of any unclarity in industry practices in this respect, certain specifications and standards of general applicability are essential to price control. Maximum prices cannot be established for an infinite number and variety of grades, kinds, classes or types of wastepaper. Representatives of the industry are in agreement that the specifications and standards established by this regulation represent the best possible averaging of general industry practices. * * *

In one respect, Maximum Price Regulation No. 30 may be deemed to effectuate a standardization not heretofore known in the industry. Section 1437.14 (d) provides that the maximum price for unsorted paper sold to a consumer shall not exceed the maximum price prescribed by the regulation for "No. 1 mixed paper." This was not the practice in the industry prior to price control. Prior to price control, unsorted paper was rarely sold to a consumer, but whenever it was the price [fol. 21] varied depending upon the materials contained in the lot of unsorted paper. Maximum Price Regulation No. 30 penalizes sellers upon their sales of unsorted paper to a consumer. This provision affects a very small percentage of the industry's total volume

and is absolutely necessary in order to secure effective price control with respect to wastepaper. Since every lot of unsorted paper is always of a different value from any other lot of unsorted paper, it would be impossible to establish a fair price for sales of unsorted paper. To exempt sales to consumers of unsorted paper would have the result that only those consumers who were able to sort their own paper would be able to obtain any supplies, thus giving such consumers an unfair advantage. Both consumers and dealers are in agreement that it is necessary to provide this penalty price upon sales of unsorted paper to consumers.

In the light of the foregoing, the Price Administrator finds that except for comparatively minor exceptions, Maximum Price Regulation No. 30 fixes maximum prices for different kinds, classes, or types of wastepaper only in terms of exceptions or standards, which prior to the issuance of the regulation, were in general use in the wastepaper industry, and, that with respect to any exceptions, no practicable alternative exists for securing effective price control over sales of wastepaper. The Price Administrator finds, also, that insofar as Maximum Price Regulation No. 30 effectuates standardization in the wastepaper industry, such standardization is the only practicable method of securing effective price control with respect to the wastepaper involved. In light of all of the foregoing, the Price Administrator finds that Maximum Price Regulation No. 30 complies with paragraph (j) of Section 2 of Emergency Price Control Act of 1942, as amended.

In support of their objections, Protestants argue that the provision of Maximum Price Regulation No. 30 under consideration was repealed by the Taft Amendment on July 16, 1943. This contention has been definitely rejected by the [fol. 22] Circuit Court of Appeals for the Third Circuit in *United States* v. *Pepper Bros.*, 142 F. (2d) 340, 343 (1944), in which Maris, *J.*, said:

> We conclude that subsection (j) did not repeal any of the provisions of Maximum Price Regulation 269. * * * Assuming, without deciding, that the subsection was intended to apply to a regulation validly issued before its enactment to the extent of invalidating standardization and grading provisions if the basic

facts stipulated by the subsection are not present, it will be seen that a question as to the continued validity of the regulation is presented which can only be determined upon consideration of the underlying facts.

The Price Administrator has never taken the position, however, that the Taft Amendment did not apply to maximum price regulations outstanding at the time of the passage of that amendment. It is the Administrator's view that an existing regulation might be vulnerable to attack by means of a statutory protest if it is unauthorized under the Taft Amendment. Invalidity occasioned by the Taft Amendment, however, is no different in legal effect from that occasioned by a restriction contained in any other provision of the Emergency Price Control Act, as, for example, Section [illegible] (h).

As stated by Judge Maris:

> [illegible]d subsection (j) repeal these provisions of the Regulation? Certainly the subsection does not in express terms purport to repeal any provisions of existing regulations or orders of the Administrator which were valid when they were issued. Moreover repeal by implication will not be assumed "unless no other reasonable construction can be applied." * * * Furthermore such a construction of the subsection would fly in the face of the clear intention of the Emergency Price Control Act to provide continuity of price control. See *Yakus* v. *United States*, 64 S. Ct. 660. Nothing in the legislative history of subsection (j) supports the view that it was intended to operate as a repealer. The subsection uses the language "Nothing in this Act [fol. 23] shall be construed * * * as authorizing * * *" provisions of the character described except under stipulated circumstances. Substantially the same language was used in the original Act in Section 302 (c), 50 U. S. C. A. Appendix § 942 (c). It is there directed toward restricting the authority of the Price Administrator to incorporate certain provisions in regulations promulgated by him. We think that a similar construction should be placed upon the same phraseology when used in subsection (j).

It was clearly the intention of Congress, manifested by the exclusive jurisdiction provisions of the Act, that maxi-

mum price regulations should be obeyed until declared invalid, regardless of the cause for such invalidity. *Yakus v. United States*, 321 U. S. 489, 64 S. Ct. 660 (1944). The Taft Amendment, therefore, in adding a new limitation on the Administrator's authority, merely created new grounds to protect the provisions of regulations which might be in contravention thereof.

This view is clearly the only one consistent with the Congressional intention. As pointed out by Judge Maris, Congress could not have intended the Taft Amendment *ipso facto* to repeal or invalidate outstanding maximum price regulations. It follows that the Administrator certainly must have had, at the very least, a reasonable time within which to review outstanding regulations to determine their conformity or nonconformity with the new legislation. If the Administrator did not on his own initiative review any regulation, a seller had it within his power to secure such review by asserting his objection under the statutory protest procedure. In accordance with the general statutory scheme, therefore, sellers were required to comply with the regulation until it might be changed.

With respect to the substance of Protestants' objection, it is the Administrator's opinion that the regulation in question does not in any manner run counter to the provisions of the Taft Amendment. The relevant clauses are quoted above.

From a reading of the amendment, it may reasonably be concluded that the protested provision of Maximum Price Regulation No. 30 does not impose any standardization of [fol. 24] commodities within the meaning of the statute. The alleged "standardization" to which Protestants object is "unsorted wastepaper", which means, in effect, that paper consisting of two or more grades which has not been segregated in accordance with the standards described elsewhere in the regulation. The very concept of unsorted wastepaper may be said to be the antithesis of the concept of standards, grades, or specifications. The description of "unsorted wastepaper" is not such as to mark out and reduce to specifications any homogeneous commodity. In no sense can it be said to impose mandatory commodity standards.

The supplementary statement of considerations, as quoted by Protestant, is wholly consistent with that view, saying merely that a flat price for unsorted paper may be

a new *standardization of price*, but not a new standardization or specification of description or quality of a commodity, i. e. a single maximum price is prescribed for certain wastepaper which formerly may have sold at varying prices.[2]

As stated in the supplemental statement of considerations, quoted above, prior to price control unsorted wastepaper was sold as such, although rarely to consumers. To that extent, therefore, it may be possible, in one sense, to consider "unsorted wastepaper" as a "standard". If, [fol. 25] however, it is viewed as a standard, clearly it was in general use in the industry prior to the issuance of Maximum Price Regulation No. 30. Thus, so far as the protested provision of the regulation contains any reference to a commodity standard, it adopts a standard in general use in the industry prior to price control.

Thus to the extent that unsorted wastepaper may be a standard or specification, it was in use prior to price control

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[2] The very form of the regulation itself shows that "unsorted wastepaper" was not used as a designation of a grade or standardization. Section 1347.14 (a) sets forth "*Grades* and maximum prices * * *"; subparagraph (b) refers to "*Grade* requirements"; subparagraph (c) covers "Maximum prices for *unlisted grades* of wastepaper"; while subparagraph (d) is headed "Maximum prices for unsorted wastepaper", a title conspicuously devoid of any grade or standardization concept. This is rendered especially unambiguous by the establishment of maximum prices for "unlisted grades". Subparagraph (d), both before and after the amendment of December 28, 1943, and as it appeared before the passage of the Taft Amendment, is noteworthy for its reference to constituent *grades*, coupled with its failure at any time to use such descriptive term with respect to composites, which were called simply "unsorted wastepaper" and never listed as a separate grade with a maximum price ascribed to it.

The provision governing sales of unsorted wastepaper was originally added to the regulation by Amendment No. 3 to Revised Price Schedule No. 30, on May 12, 1942. The statement of considerations accompanying the issuance of this amendment is similarly clear in the application of the word grade, or any similar words, only to the constituent elements of "unsorted wastepaper."

and therefore the use of this description in the establishment of a maximum price is not proscribed by the Taft Amendment. As shown below, establishing a maximum price for a commodity described in terms historically used in an industry is not standardization of a commodity.[3]

Even if it were true that the section of the regulation under reference imposed a new standard or specification of a commodity not theretofore in general use in the industry, it would still not be subject to attack under the Taft Amendment, since there was no practicable alternative to this provision for effective price control of wastepaper. That the provision is necessary for effective price control is obvious. If unsorted wastepaper were considered a separate grade or standard, and the Administrator were not permitted to control the maximum price thereof, the entire price structure in wastepaper would fall, since it would be necessary only for a seller of wastepaper to mix two different grades together, in whatever quantities and proportions he might choose, to circumvent price control.[4] The Ad-

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[3] Protestants have not alleged that the maximum price established in the regulation for unsorted wastepaper is not generally fair and equitable, but have limited their attack on the regulation to the applicability of the Taft Amendment thereto.

[4] The provision under discussion was amended on December 28, 1943. The statement of considerations accompanying the issuance of this amendment said, in part: "The changes in Maximum Price Regulation No. 30 accomplished by the accompanying amendment are ancillary to the wastepaper compliance program undertaken by the Office of Price Administration. This program is being conducted with the utmost vigor because of the seriousness of wastepaper black market. The existence of this black market is universally acknowledged by wastepaper sellers and consumers alike. Unless checked, it will lead to a complete breakdown of the price control program for this very important raw material. If that were permitted to occur, honest consumers of wastepaper would be unable to obtain their fair share of the available supply. Normal distribution of wastepaper would be completely disrupted, which would further diminish supplies. Cost increases to consumers would mount so as to affect seriously the production and

[fol. 26] ministrator is unable to envisage any method of preventing the mixing of grades for the purpose of avoiding the maximum prices established for specific grades without using the term "unsorted wastepaper," and prescribing a maximum price for such mixed lots. Clearly, because of the infinite number of possible mixtures which can be made, a specific maximum price for each possible combination of grades would be impossible. Further, since the exact contents of any particular lot is not known with any accuracy, the establishment of specific prices for particular lots would be impossible.

Because of the unique quality of each particular lot of unsorted wastepaper, neither a "freeze" method of establishing maximum prices, nor an "in-line" method of pricing, such as is used for unlisted grades, could be employed.

It thus appears that unless price control in the field of wastepaper is to be completely emasculated by the simple expedient of slightly adulterating a lot of paper of a particular grade, unsorted wastepaper must be subject to price control. Therefore, if "unsorted wastepaper" is a stand-

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distribution of the vital products for which wastepaper is a raw material. * * *

"The only substantive change relates to the so-called "unsorted" wastepaper provision in the regulation. This provision, which in effect exempted sales of unsorted wastepaper below the consuming level, is now amended so that sales of unsorted wastepaper at any level may not be made at a price in excess of the maximum price permitted by the regulation for 'No. 1 Mixed Paper.' This change was necessary because dishonest dealers had utilized the provision to outbid dealers who were living up to the regulation. Since the former was permitted under the regulation to bid more for the unsorted wastepaper than he could obtain for the wastepaper after sorting unless he violated the ceilings the honest competitor found it impossible to compete in purchasing the unsorted material. Prior to price control in this field, most unsorted wastepaper moved at the price for mixed paper, and the change consequently does not substantially affect normal business practices. In those few instances where the new provision might otherwise penalize the owner of wastepaper containing valuable fibre, the owner can sort the wastepaper before making the sale." Pike & Fischer OPA Serv. p. 42: 181-181-A.

ard or specification not in use in the industry prior to price control, the establishment of a price for it in Maximum Price Regulation No. 30 is absolutely essential.

As shown above, the protested provisions of the regulation is not invalid under either clause (3) or clause (4) of [fol. 27] the Taft Amendment. It may be well, however, to refer to Protestant's apparent contention that if the provision is invalid under either clause (3) or clause (4), even though it comes within the exceptions stated in the other of these clauses, then the regulation must be stricken down.[5] This position is untenable. As stated by Judge Maris, in *United States* v. *Pepper Bros.*, *supra*, at p. 343:

> Under the terms of subsection (j) provisions for standards and grades are not to be included in a regulation unless certain basic facts are present. They must be necessary for securing effective price control *or* they must have previously been in general use or required by another Governmental agency. [Italics supplied.]

The legislative history is clear on this matter. It will be necessary at this point only to observe that the Stabilization Extension Act of 1944 reenacted subsection (j) without change after the President, in signing the amendment originally, said:

> The language of the bill appropriating funds for the Office of Price Administration was construed as prohibiting the Administrator for making use of standards in any case regardless of how essential they were to price control unless such standards had been previously established by industry acceptance or by government action. Such a construction would cripple price control because trade standards are frequently lacking or, as in the case of the grades of meats, incompletely established.
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> I am satisfied this bill has not such meaning. It was presented to the Senate and House to avoid the consequences that would have followed the adoption of the

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[5] Protestants' statement in this regard is: "* * * subdivision (3) of the Taft Amendment does not authorize the setting of a maximum price of a commodity within the prohibition of subdivision (4). * * *"

language in the appropriation bill. Senator Taft, who sponsored the language in the appropriation bill and the modification in this bill, stated expressly that the modification preserved power in the Administrator to "standardize" a commodity in any case in which this was "absolutely essential to an effective system of [fol. 28] fixing prices." These assurances are in accord with the purpose and the terms of the compromise amendment and must be taken as controlling. It is with this understanding that I have signed the bill.

Properly construed, clauses (3) and (4) are not concomitant. It is not in any true sense "standardization" of a commodity by the Administrator to establish maximum prices of commodities on the basis of historically and generally recognized grades or standards thereof. It is clear from the legislative history of the original passage of the Taft Amendment that "to standardize" was used in clause (3) to mean "to establish standards or to require conformity to standards," and that the pricing on the basis of industry established standards was not within the purview of the prohibition in that section. The view that to "standardize" means to *establish* standards not already established, and does not mean to base prices on existing standards, seems to have been held by the author of proviso to the War Agencies Appropriation Bill, which unqualifiedly prohibited the Administrator from "requiring • • • standardization." When this proviso was before the House, Representative August H. Andresen, its author, explained that "the sole objective of the amendment is to stop the OPA from issuing regulations, which compel changes in business practices." 89 Cong. Rec., July 3, 1943, p. 7215. He added that his proviso "permits the lumber industry to maintain the grades that existed prior to the establishment of the OPA upon which grades the OPA will have to establish ceilings."

Clause (3), therefore, prohibits the *establishment* of standards or specifications unless there is no practicable alternative for effective price control; while clause (4), in effect, defines those standards the use of which for price control purposes is not "standardization."

Any possible doubt as to this point was removed by Senator Wagner's statement in connection with the reenactment of the Taft Amendment by the Stabilization Act of 1944. He said:

The bill reenacts without change section 2 (j) of the present act, which was added to the act by the Com-
[fol. 29] modity Credit Corporation Act of 1943. This will leave in effect the established construction of that subsection which is that the Price Administrator is authorized to make use of standards or specifications, in establishing maximum prices, in three situations and in those situations only: First, where the standards or specifications have been in general use in the trade or industry affected; second, where they have been promulgated and their use lawfully required by another Government agency; and third, when the Administrator finds that there is no practicable alternative for securing effective price control of the commodity involved. A denial of authority to use standards or specifications in any one of those three situations would seriously impair the price control program. I make this statement as chairman of the Senate conferees because there is a statement in the report of the House managers which might be understood as being to the contrary, and I want to make clear the understanding of the Senate Conferees. (Statement Submitted to the Senate on June 21, 1944, by Senator Wagner on Behalf of the Managers on the Part of the Senate on the Conference Report on Senate Bill 1764 Extending the Price Control and Stabilization Acts, 90 Cong. Rec. 6450).

Since Protestants contend that "subdivision (3) of the Taft Amendment does not authorize the setting of a maximum price of a commodity within the prohibition of subdivision (4)," presumably they would have to contend also that subdivision (4) of the Taft Amendment does not authorize the setting of a maximum price of a commodity within the prohibition of subdivision (3). This would have the result of prohibiting the Price Administrator's using even established standards unless he determined that there was no practicable alternative thereto for effective price control. To hold that the Administrator may establish maximum prices for grades of commodities historically recognized in the trade affected only on a determination that there is no practicable alternative thereto for effective
[fol. 30] price control would raise doubts as to the validity of dollar and cents ceilings, and would be a completely un-

realistic approach to price control.[6] That this was not, and could not have been, the intention of Congress is self-evident. It may be noted that such interpretation would lead to doubts as to the validity of all of Maximum Price Regulation No. 30. Protestants have never suggested or intimated that the regulation is invalid generally, clearly limiting their objections to section 1347.14 (d) of the regulation.

Protestants have contended, however, that even if it be granted that the regulation is now valid, it became invalid upon the passage of the Taft Amendment, and was not again validated until September 11, 1943, when the Price Administrator issued a supplementary statement of considerations publicly announcing his determination that so far as the regulation provided specifications not theretofore in general use in the industry, it was necessary because there was no practicable alternative for effective price control. It does not appear on what basis Protestants ask the Administrator to declare a regulation to have been invalid at some date in the past. From the language of sections 203 and 204 of the Act, it seems at least highly doubtful that the Administrator may make such a declaration. Even if such retroactive declaration might be made for some purposes, it is highly questionable whether it could effectively remove liability for violations accrued under the terms of a regulation prior to such declaration of invalidity. Cf. *Buckley Dement & Company* v. *Bowles*, Em. App., decided July 13, 1944. In any event, there is no basis, in the Administrator's opinion, for the contention that the protested provision was at any time invalid. Whatever may be the rule with respect to the necessity of a public declaration by the Administrator, that there is no practicable alternative to the standardization adopted by the Administrator, as a condition precedent to the validity of a maximum price [fol. 31] regulation adopting new standards subsequent to

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[6] In this connection the statement of Price Administrator Prentiss M. Brown before the so-called Boren Subcommittee on June 18, 1943, is illuminating. Hearings before the House Subcommittee on Interstate and Foreign Commerce, pursuant to H. Res 98, 78th Cong., 1st Sess., Part 2, pp. 695 ff.

the enactment of the Taft Amendment[1] it is clear, for the reasons set forth above, that such declaration was not made a condition precedent to the continued effectiveness of such a regulation promulgated prior to the amendment. Thus, even if clause (3) of the Taft Amendment were controlling in the present proceeding, this contention by Protestants would be unsound.

For the foregoing reasons the protest must be denied.

Issued this 29th day of July 1944.

(S.) James G. Rogers, Jr., Acting Administrator.

[fol. 32] Before Office of Price Administration

Supplementary Statement of Considerations Involved in the Issuance of Maximum Price Regulation No. 30—Wastepaper

[See Exhibit A to Protest]

[fol. 33] Office of Price Administration

Part 1305—Administration

Supplementary Order No. 64

Amendment of preamble of certain maximum price regulations covering paper, paper products, raw materials for paper and paper products, printing and publishing with respect to use of specifications or standards

A statement of the reasons for the issuance of this supplementary order has been issued simultaneously herewith, and filed with the Division of the Federal Register.[2]

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[1] It is the opinion of the Administrator, however, that no such public declaration is required for the validity of any regulation under subparagraphs (3) or (4) of the Taft Amendment. Fact-determinations must be made under both sections, but in neither case is a declaration of such determination made a condition precedent to the validity of the regulation by the terms of the statute.

[2] Copies may be obtained from the Office of Price Administration.

It is hereby ordered, That:

1305.96 *Amendment of preamble of certain maximum price regulations covering paper, paper products, raw materials for paper and paper products, printing and publishing with respect to use of specifications and standards.*—(a) The preamble to each of the price regulations listed below is amended by adding thereto the following sentence:

Such specifications and standards as are used in this regulation were, prior to such use, in general use in the trade or industry affected.

Regulation and Federal Register Citations:

RPS 32: 7 F.R. 1264, 2000, 2132, 2740, 3182, 8949.

MPR 129: 7 F.R. 3178, 3242, 3482, 3554, 4176, 4668, 5172, 5789, 5712, 5943, 7974, 8939, 8948, 9131, 9724, 10152, 10812.

RMPR 257: 8 F.R.

MPR 307: 8 F.R. 1389, 2335.

MPR 349: 8 F.R. 3617, 6110, 7266.

MPR 359: 8 F.R. 4635, 4727, 6736.

MPR 365: 8 F.R. 4721.

MPR 369: 8 F.R. 5174.

RMPR 387: 8 F.R. 8597.

[fol. 34] (b) The preamble to each of the price regulations listed below is amended by adding thereto the following sentence:

Such specifications and standards as are used in this regulation were, prior to such use, in general use in the trade or industry affected and have previously been promulgated and their use lawfully required by another Government agency.

Regulation and Federal Register citations:

MPR 114: 7 F.R. 2843, 3576, 5059, 5564, 8997, 8948; 8 F.R. 321, 2334, 8877, 10558.

MPR 400: 8 F.R. 7556.

(c) The preamble to each of the price regulations listed below is amended by adding thereto the following sentence:

Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation.

Regulation and Federal Register citations:

MPR 30; 7 F.R. 9732; 8 F.R. 3845, 6109, 7350, 7199, 7821.

MPR 47; 8 F.R. 270.

RMPR 130; 7 F.R. 9251, 10255; 8 F.R. 1586, 2570, 7766.

MPR 266; 7 F.R. 9229, 10379, 11009; 8 F.R. 164, 606, 9380.

MPR 344; 8 F.R. 3198, 6109.

MPR 182; 7 F.R. 5712, 6048, 7974, 8997, 8948, 9724.

This supplementary order shall become effective September 11, 1943.

(56 Stat. 23, 765; Pub. Law 151, 78th Cong.; E. O. 9250, 7 F.R. 7871; E. O. 9328, 8 F.R. 4681.)

Issued this 11th day of September 1943.

Chester Bowles, Acting Administrator.

[fol. 35] Office of Price Administration

STATEMENT OF THE REASONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY ORDER NO. 64

The reasons for the issuance of this supplementary order are the same as those for the issuance of Supplementary Order No. 55 and the latter are incorporated herein by reference.

Issued this 11th day of September 1943.

Chester Bowles, Acting Administrator.

STATEMENT OF THE REASONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY ORDER NO. 55 AMENDMENT OF PREAMBLE OF CERTAIN MAXIMUM PRICE REGULATIONS COVERING GROCERY PRODUCTS AND TOBACCO WITH RESPECT TO USE OF SPECIFICATIONS OR STANDARDS

The Taft Amendment to the Emergency Price Control Act of 1942 restricts the power of the Administrator to make use of standards in price regulation. The Amendment, contained in House Joint Resolution No. 147 which continued the Commodity Credit Corporation, adds a new paragraph (j) to Section 2 of the Emergency Price Control Act of 1942. The standards provisions are contained in clauses (3) and (4) of this paragraph which provide as follows:

> (j) Nothing in this Act [i.e. the EPCA] shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.

To determine whether and to what extent the price regulations issued by the Office of Price Administration conform to the "standards" requirement of the Taft Amendment, the Administrator has caused every price regulation to be carefully scrutinized. Supplementary Order No. [fol. 37] 55, which this Statement accompanies, amends the preamble of the price regulations covering grocery products and tobacco E. H. P. by adding appropriate findings of compliance with the Amendment, wherever this may be done. Similar orders are being issued with respect to other price regulations issued by the Office of Price Ad-

ministration. In addition, a separate supplementary statement of considerations is being issued for each regulation justifying the finding that the regulation complies with the Amendment. Appropriate amendments will be issued to those price regulations in which a finding cannot be made of compliance with the "standards" provisions of the Taft Amendment.

Since doubts have been expressed as to the exact meaning of the "standards" provisions, it is appropriate that the Price Administrator state his views as to their meaning and intent and the basis upon which he has acted in determining whether the price regulations issued by this Office conform to the requirements of the provisions.

> Clause 3 of the Taft Amendment states that "Nothing in this act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity."

Although as was pointed out by Senator Taft, "the word 'standardization' which went into the amendment was not thought of or debated particularly" (*Cong. Rec.*, July 6, 1943, at p. 7327), it is clear from the legislative history and context of the clause that to "standardize" was considered as meaning, broadly, to establish standards or to require conformity to standards.

Thus, for the purposes of price control, the Administrator "standardizes" a commodity—that is, establishes standards for it—whenever he bases ceiling prices upon standards or specifications which were not previously established either by general industry usage or by the action of another government agency. The clause recognizes the Administrator's authority to establish standards whenever he determines "that no practicable alternative [fol. 38] exists for securing effective price control with respect to" a commodity.

The Administrator, however, does not "standardize" a commodity merely by basing ceiling prices for it upon standards, when the commodity had already been standardized either by the general and voluntary use of those standards in the industry or by the action of another Government agency requiring their use.

When the Price Administrator requested the relaxation of the prohibition against standardization contained in the War Agencies Appropriation Bill, which unqualifiedly prohibited the Administration from "requiring * * * standardization", he accepted this understanding of "standardize." He did this explicitly by accompanying the proposal that he retain power to standardize when essential to effective price control with a suggested clarifying provision declaring that "no order * * * shall be deemed to require standardization" because it fixes maximum prices for different kinds, classes or types of a commodity described in terms of standards or specifications which were "in substantial use in the * * * industry affected" or were established by another Government agency. For text, see *Cong. Rec.*, July 6, 1943, at p. 7326.

The Administrator's proposal was accepted without change as an amendment to the Commodity Credit Corporation Bill by the Senate Committee on Banking and Currency. Although the committee amendment was subsequently modified on the floor, nothing in the changes which took place, or in the history of the provision either in the Senate or the House, suggests any other understanding of the basic concept of standardization.

> Clause 4 of the provisions states that "Nothing in this Act shall be construed * * * (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards under such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency."

[fol. 39] This clause had its origin in the provision which the Administrator proposed to amend to the clause (now clause 3) giving him power to standardize where essential for effective price control. The purpose of this provision was to make clear that the action it described—the setting of maximum prices on the basis of standards already established—was *not* standardization. In the form proposed by the Administrator the clause was approved by the Senate Banking and Currency Committee in a report submitted

by Senator Wagner (for himself and Senator Taft). *Senate Report No.* 387, 78th Cong., 1st Sess., July 3, 1943. In this report, the action described in the clause was treated as wholly distinct from standardization. *Id.*, at p. 3.

The form of the clause was changed as a result of an amendment offered from the floor by Senator Taft. He stated that the amendment had the approval of the Administrator and presented it as meeting the objections which the Administrator had raised to the proviso in the Appropriation Act which prohibited outright any order "requiring * * * standardization." The purpose of the amendment seems to have been to prevent the claim that pricing by reference to types of standards, *other than those specified in the clause*, would not be "standardizing" and hence would not be subject to the limitations in clause 3. The change in form resulting in forbidding the Administrator to price by standards, when he had not established the standards in the manner permitted by clause 3, unless the standards were of the particular kinds which clause 4 specifies. Had Senator Taft intended to confine the Administrator's power to make use of standards to commodities already standardized, and thus to deny the Administrator's own power to standardize, his amendment would have been a reiteration of the proviso and could not possibly have been supposed to satisfy the objections to that proviso which the Administrator had expressed.

In explaining the amendment, Senator Taft said: "The amendment as I now offer it is only slightly different from the committee amendment." *Cong. Rec.*, July 6, 1943, at p. 7327. In addition to the change already noted, the modified amendment tightened the committee amendment in two other respects. It required that industry standards, if they [fol. 40] were to be a basis of action under clause 4, should have been in "general", not merely "substantial," use, and that standards promulgated by another Government agency should be standards which the agency had lawfully required to be used. These three changes were not improperly described as "slight". No such description could have been made of a change which deprived the Administrator of any power to establish new standards, however essential to price control, and which, in so doing, invalidated scores of outstanding maximum price regulations.

The statement of the managers on the part of the House pointed out that the Taft Amendment warranted "the re-

peal of the somewhat broader limitations recently included in the National War Agencies Appropriations Act of 1944, to which the Administrator objected." The characterization of the Taft Amendment as imposing narrower limitations than the appropriation proviso would not be true if clause 4 nullified clause 3.

Some uncertainty has been expressed as to the meaning of the Taft Amendment because of two statements which appear in the managers' statement.

1. In describing the effect of clause 4, the managers state: "But requirements that standards or specifications may be used in manufacturing or selling, or that such standards appear on the invoice, are prohibited" except where the standards meet the conditions specified in clause 4. Read in conjunction with clause 3, this merely emphasizes that clause 4 forbids the Administrator to employ standards in price control when those standards fail to meet the stringent conditions of clause 4 unless he can bring his action within the exception to clause 3 by making a determination that no practicable alternative to standardization exists for securing effective price control.

2. The managers also state: "Each of these four limitations [the four clauses] is made separately applicable to the issuance of maximum price regulations." The purpose of this observation seems to have been to reassure those who, like Senator Vandenberg (See *Cong. Rec.*, July 6, 1943, at p. 7327), feared that the Administrator might attempt to exercise his power to standardize so as to impair trade and brand names or to reintroduce grade labeling. The statement indicates that compliance with the exception in clause [fol. 41] 3 will not justify action in violation of clause 1 or 2 which relate to trade and brand names and grade labeling. It does not indicate that clause 4 defeats clause 3. Clause 4, had its origin in a purpose to indicate actions which *were not subject* to clause 3, and the distinction between the actions subject to each clause was consistently maintained during the bill's history. It cannot be said that clause 4 governs actions which *are subject* to clause 3 and so limits them as in effect to nullify the power to standardize which the exception in clause 3 permits.

As a result of this analysis of the language of the Taft Amendment and its legislative history, the Administrator has reached the conclusion that he may properly issue price

regulations in which prices are based on or calculated by reference to standards or specifications only if one of the following conditions is met:

1. The standards or specifications were, prior to their use in the regulation, in general use in the industry.

2. The use of the standards or specifications was, prior to their use in the regulation, lawfully required by another Government agency.

3. The Administrator has determined that no practicable alternative to using the standards or specifications exists for securing effective price control.

This conclusion accords with the President's understanding of the meaning of the Taft Amendment, as stated by the President when he signed the Commodity Credit Corporation bill. The President stated that a construction which would prohibit "the Administration from making use of standards in any case regardless of how essential they were to price control unless such standards had been previously established by industry acceptance or trade acceptance" would "cripple price control". The President declared that he signed the bill with the understanding that the Taft Amendment "preserved power in the Administrator to 'standardize' a commodity in any case on which this was absolutely essential to an effective system of fixing prices."

Issued this 11th day of September 1943.

Chester Bowles, Acting Administrator.

[fol. 42] BEFORE OFFICE OF PRICE ADMINISTRATION

AMENDMENT No. 6 TO MAXIMUM PRICE REGULATION No. 30

Part 1347—Paper, Paper Products, Raw Materials for Paper and Paper Products, Printing and Publishing

[MPR 30,[1] Amdt. 6]

Wastepaper

A statement of considerations involved in the issuance of this amendment, issued simultaneously herewith has been filed with the Division of the Federal Register.[2]

Maximum Price Regulation No. 30 is amended in the following respects:

1. Section 1347.10 is amended to read as follows:

§ 1347.10 *Records and reports.*—(a) Every person who has been required under Revised Price Schedule No. 30 to keep records for inspection by the Office of Price Administration shall preserve such records for so long as the Emergency Price Control Act of 1942 shall remain in effect.

(9) Every person who purchases or sells commercially packed wastepaper, either for his own account, or for the account of another, shall make, and shall keep for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942 shall remain in effect, complete and accurate records of each purchase or sale of wastepaper by him, whether or not the same be commercially packed showing the following:

(1) Date of purchase or sale.

(2) Name and address of the buyer or seller.

(3) Grade of wastepaper purchased or sold.

(4) Quantity or each grade purchased or sold.

(5) Whether the wastepaper purchased or sold was commercially packed or in other condition.

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[1] 7 F. R. 9732; 8 F. R. 3845, 6109, 7350, 7199, 7821, 13049.

[2] Copies may be obtained from the Office of Price Administration.

[fol. 43] (6) Prices or other charges paid or received.

(7) Warranties, if any, given or received.

Such records shall set forth separately the f. o. b. point of shipment price, the origin and destination of the shipment, the means of transportation used, the amount of the transportation charge, and any other amounts paid or received in connection with such sale.

(c) Every consumer of wastepaper shall in addition to the above make and keep a complete and accurate record of each shipment of wastepaper delivered to him and of all weighing, inspecting, sorting, sampling, testing or grading operations performed by him or on his behalf with respect to each such shipment. Each record of each shipment required by this paragraph shall show:

(1) The date of its delivery to the consumer;

(2) The manner of its delivery, that is, by freight car, truck, or other means of transport;

(3) The freight car number, vehicle license number or other identification of the vehicle or other means of transportation in or by which delivery is made;

(4) The total weight of wastepaper and other material contained in the shipment, and the weight of each bale or package comprising the same;

(5) All facts relating to such shipment which have been ascertained at or after delivery thereof by performing upon such shipment or any portion thereof any weighing, inspecting, sorting, sampling or testing operations. Facts required to be recorded are:

(i) The grade name of each grade of wastepaper found in the shipment or sample;

(ii) The total weight of wastepaper from such shipment which was inspected, sorted, sampled, tested or graded;

(iii) The weight, ascertained by inspecting, sorting, sampling, testing or grading the wastepaper from such shipment upon which such operations or any of them were performed.

[fol. 44] (*a*) Of each grade of wastepaper found in the shipment or sample; and

(*b*) Of outthrow; the term "outthrow" as shown in such record, and as used herein shall have the meaning given to it by this regulation.

(6) The names of the person or persons responsible for supervising the receiving, weighing, inspecting, sorting, sampling, or testing of the wastepaper delivered.

(d) On or before January 15, 1944, every person who sells commercially packed wastepaper shall file with the Office of Price Administration, Washington, D. C., an inventory statement of wastepaper on hand as of December 31, 1943. This inventory statement shall show all wastepaper owned or possessed by him or for his account, and shall be broken down to show the location of all wastepaper covered by it. In the event that any person fails to comply with this requirement, or if the inventory statement filed by him is incorrect or incomplete, in addition to any other penalties prescribed by law, such person must file on or before the 15th day of each month thereafter an inventory statement in the form above specified, which statement shall be as of the last day of the preceding month.

(e) Persons required to keep records and submit reports to the Office of Price Administration shall keep such other records and submit such other reports in addition to or in place of those required in this section as the Office of Price Administration may from time to time require.

2. Appendix A (d) is amended to read as follows:

(d) *Maximum prices for unsorted wastepaper.*—The maximum prices for sales of unsorted wastepaper to any person shall not exceed the maximum price prescribed by this regulation for "No. 1 mixed paper", regardless of the grades and quantity of each grade contained in such unsorted wastepaper.

3. The text of Appendix A, paragraph (f) preceding subparagraph (1) is amended to read as follows:

(f) *Invoice requirements.*—All sales of commercially packed waste paper shall be invoiced. When delivery

[fol. 45] of the wastepaper is out of seller's warehouse, the invoice shall accompany the delivery or be mailed to purchaser before the end of the business day following the day upon which the wastepaper is shipped. In all other cases, the invoice shall be mailed before the end of the business day following the day upon which the wastepaper is shipped except that in those cases where seller does not receive the description of the wastepaper from his own supplier within that time, he shall send the invoice to purchaser as soon as he does receive that description. A copy of such invoice shall be kept on file by the seller, and the original shall be kept on file by the purchaser. The invoice shall state as separate items the following data:

This amendment shall become effective January 4, 1944.

NOTE: The record-keeping and reporting requirements of this amendment have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

(56 Stat. 23, 765; Pub. Law 151, 78th Cong.; E.O. 9250, 7 F.R. 7871; E.O. 9328, 8 F.R. 4681)

Issued this 28th day of December 1943.

Chester Bowles, Administrator.

[fol. 46] OFFICE OF PRICE ADMINISTRATION

STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF AMENDMENT NO. 6 TO MAXIMUM PRICE REGULATION NO. 30, WASTEPAPER

The changes in Maximum Price Regulation No. 30 accomplished by the accompanying amendment are ancillary to the wastepaper compliance program undertaken by the Office of Price Administration. This program is being conducted with the utmost vigor because of the seriousness of the wastepaper black market. The existence of this black market is universally acknowledged by wastepaper sellers and consumers alike. Unless checked, it will lead to a complete break down of the price control program for this very important raw material. If that were permitted to occur, honest consumers of wastepaper would be unable to obtain their fair share of the available supply. Normal distribution of wastepaper would be completely disrupted, which would further diminish supplies. Cost increases

to consumers would mount so as to affect seriously the production and distribution of the vital products for which wastepaper is a raw material.

Wastepaper constitutes more than 50% of the furnish for all paper products, and it is assuming an even greater importance as a substitute for virgin woodpulp which is growing scarcer because of the lack of manpower for wood cutting. Wastepaper constitutes far more than one half of the furnish for all paperboard, from which the containers are made that carry countless war and essential civilian items throughout the world. The material is so short at present that pressure upon the ceilings established by Maximum Price Regulation No. 30 are very strong. Present indications are that the shortage will continue and that pressure against the ceilings will not abate. Consequently, it is [fol. 47] clear that an effective compliance program is essential. The changes embodied in the accompanying amendment are an indispensable adjunct to a workable compliance program.

The only substantive change relates to the so-called "unsorted" wastepaper provision in the regulation. This provision, which in effect exempted sales of unsorted waste paper below the consuming level, is now amended so that sales of unsorted waste paper at any level may not be made at a price in excess of the maximum price permitted by the regulation for "No. 1 Mixed Paper." This change was necessary because dishonest dealers had utilized the provision to outbid dealers who were living up to the regulation. Since the former was permitted under the regulation to bid more for the unsorted wastepaper than he could obtain for the wastepaper after sorting unless he violated the ceilings, the honest competitor found it impossible to compete in purchasing the unsorted material. Prior to price control in this field, most unsorted wastepaper moved at the price for mixed paper, and the change consequently does not substantially affect normal business practices. In those few instances where the new provision might otherwise penalize the owner of wastepaper containing valuable fibre, the owner can sort the wastepaper before making the sale.

The most extensive changes in the regulation relate to the keeping of records. The new record keeping provisions do not require any substantial amount of new records to be made, but they do require records which exist to be pre-

served. In particular, the new provisions require the consumer to keep very complete receiving records and also to record and preserve all data relating to any sample, testing, or inspecting operations made by him. The very great majority of consumers make such records at present. The new provisions will put a stop to the practice of falsifying records which has been engaged in by certain consuming mills.

The record-keeping is also expanded to require persons who sell commercially packed waste paper to keep records upon all their purchases and sales, whether or not the waste [fol. 48] paper thus bought or sold is commercially packed. Also new is a provision that an inventory report be made on waste paper on hand as of December 31, 1943. This requirement is necessary in order to make it possible to determine what quantity of waste paper has actually passed through the hands of the waste paper dealer during any period of time. This information, in turn will make it possible to prevent above ceiling payments being made by means of a scheme of invoicing and paying for quantities of waste paper which were in fact not shipped.

Finally, the invoice requirement is slightly expanded. All sales of commercially packed waste paper must now be invoiced, rather than only those sales which are made to a consumer. The new invoice requirement is also more definite and certain with respect to the time within which sellers of waste paper must render an invoice to their buyers.

In light of the foregoing, the Price Administrator finds that Amendment No. 6 to Maximum Price Regulation No. 30 is consistent and will effectuate the purposes of the Emergency Price Control of 1942, as amended, and Executive Orders 9250 and 9328.

Issued this 28th day of December 1943.

Chester Bowles, Administrator.

[fol. 49] Certification of Transcript of Proceedings Before the Price Administrator

The undersigned, Chester Bowles, does hereby certify that pursuant to the Emergency Price Control Act of 1942, as amended, he is the duly appointed, qualified, and acting Price Administrator of the Office of Price Administration and that the within and foregoing Transcript of Proceedings is a true and correct transcript of such portions of

the proceedings before the Price Administrator in connection with the protest of the Thomas Paper Stock Company, Docket No. 1030-9-P, as are material under the complaint.

Dated at Washington, D. C., this 16th day of September, 1944.

Chester Bowles, Administrator.

[fol. 50] [Stamp:] United States Emergency Court of Appeals. Filed Aug. 26, 1944. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 159

THOMAS PAPER STOCK COMPANY and ALVIN E. SANDROFF, Complainants,

vs.

CHESTER BOWLES, Price Administrator, Respondent

COMPLAINT

The Complainants, Thomas Paper Stock Company and Alvin E. Sandroff, bring this Complaint against Chester Bowles, the duly appointed Administrator of the Office of Price Administration under the Emergency Price Control Act of 1942 as amended, and allege:

1. This Complaint is filed pursuant to Section 204 of the Emergency Price Control Act of 1942 as amended.

2. The regulation protested is Maximum Price Regulation No. 30—Wastepaper, which was issued November 23, 1942.

[fol. 51] 3. Complainants' joint protest of said regulation was filed with the Price Administrator on June 15, 1944, and a supplement thereto was filed on June 29, 1944. The Price Administrator made disposition of such protest on July 29, 1944, by issuing an order and opinion denying such protest in its entirety.

4. Complainants have been aggrieved by denial of their protest in the following manner:

By the denial, the Price Administrator has refused to recognize the illegality of Section 1347.14, subdivision (d), of Maximum Price Regulation No. 30, which standardizes unsorted wastepaper in contravention of Section 2 (j) of the Emergency Price Control Act known as the Taft Amendment (added by the Act of July 16, 1943, Pub. L. 151, 78th Cong., 1st Sess.) as pointed out in paragraph 5 of this Complaint.

Complainants' business consists in large part in dealing in printers' unsorted wastepaper. This paper is made up of clippings of new paper from printers' cutting machines and consists of unbleached and bleached sulphite and soda pulp, which, by reason of its high quality, is manufactured into book and bond paper. This type of unsorted waste- [fol. 52] paper has always been distinguished from a lower grade of unsorted wastepaper obtained from office buildings, department stores, etc., which is used to manufacture box board and paper board.

The illegal standardization created by Section 1347.14, subdivision (d), of Maximum Price Regulation No. 30, standardizes all unsorted wastepaper into a single grade and ignores the general usage in the industry of distinguishing between higher and lower grades of unsorted wastepaper and their relative values.

The Office of Price Administration has attempted to enforce said illegal regulation by bringing an indictment and a triple damage suit against the Complainants, and by threatening similar enforcement in the future.

5. The objection asserted against Maximum Price Regulation No. 30 is that Section 1347.14, subdivision (d), is in contravention of the Taft Amendment in that it unlawfully provides as follows:

> "(d) Maximum prices for unsorted wastepaper. Unsorted wastepaper, which contains two or more unsorted grades, shall not be subject to the maximum prices prescribed by this Maximum Price Regulation No. 30, in the event that such paper is sold to a purchaser who warrants in writing to the seller that he will [fol. 53] not use such paper as a consumer thereof, but will sort and grade it for resale into (1) grades listed in this Maximum Price Regulation No. 30, or (2) specialty grades described in paragraph (c) of this § 1347.14, or (3) paper which does not constitute wastepaper as defined in § 1347.11, and that he will sell such paper so sorted and graded at prices no higher than the maximum prices prescribed for such grades by this Maximum Price Regulation No. 30, or by any other applicable maximum price regulation or price schedule. If, however, such unsorted paper is sold to a consumer thereof, the price therefor shall not exceed the maxi-

mum price prescribed by this Maximum Price Regulation No. 30 for 'No. 1 mixed paper'. The warranties required from the purchaser must be kept in the seller's records in the manner provided in § 1347.10."

(a) Said Section of said regulation fixes a maximum price for a commodity, unsorted waste paper, which is described in terms of specifications or standards which prior to said regulation were neither "in general use in the trade or industry affected" nor had "previously been promulgated and their use lawfully required by another Government Agency" and hence is contrary [fol. 54] to the provisions of subsection (4) of the Taft Amendment.* Section 1347.14, Subdivision (d), of said regulations became invalid as of the date of the enactment of the Taft Amendment, July 16, 1943.

(b) Because of the unequivocal language of subsection (4), of the Taft Amendment, the regulation in question cannot be legally predicated upon subsection (3) of the Taft Amendment, which permits standardization upon a "determination" by the Price Administrator, "that no practicable alternative exists for securing ef- [fol. 55] fective price control with respect to such commodity." Even if it be assumed (without conceding) that a standardization prohibited by subsection (4) may still be authorized by subsection (3) of the Taft Amend-

* "(j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government Agency."

ment, a regulation founded upon subsection (3) becomes effective only from the date of a "determination" by the Price Administrator. Although on September 11, 1943, the Price Administrator, in a Supplementary Statement of Considerations, made a "determination" as to the standardization created by Section 1347.14, subdivision (d), of Maximum Price Regulation No. 30, such determination in no event could have provided a valid basis for the regulation in question until the date of said determination, September 11, 1943. Hence the regulation in question was invalid and of no effect during the period from July 16, 1943 until September 11, 1943.

6. In consideration whereof and inasmuch as Complainants are without adequate remedy save in this court, Complainants pray:

(a) That Respondent, Chester Bowles, be requested to make a full and complete answer hereto within the [fol. 56] time prescribed by and in accordance with the rules of this court;

(b) That this court find in the alternative,

(1) That Section 1347.14, subdivision (d) of Maximum Price Regulation No. 30 has been invalidated by the Taft Amendment and that Respondent, Chester Bowles, his agents, attorneys, and all persons acting for and under him in the Office of Price Administration, be restrained and enjoined from enforcing Section 1347.14, subdivision (d); of Maximum Price Regulation No. 30; or

(2) That Section 1347.14, subdivision (d) of Maximum Price Regulation No. 30 was invalid and of no effect from July 16, 1943 until September 11, 1943 and that Respondent, Chester Bowles, his agents, attorneys, and all persons acting for and under him in the Office of Price Administration, be restrained and enjoined from enforcing Section 1347.14, subdivision (d) of Maximum Price Regulation No. 30 in respect [fol. 57] to all alleged violations thereof subsequent to July 16, 1943, and up to September 11, 1943.

(c) That Complainants may have such other and further relief as the nature of this case shall require and to the court may seem just and meet.

Thomas Paper Stock Company, an Illinois Corporation, Alvin E. Sandroff, by David L. Bazelon, Jack H. Oppenheim, Their Attorneys.

Address for Service: David L. Bazelon, Jack H. Oppenheim, 231 South LaSalle Street, Chicago, Illinois.

[fol. 55] [File endorsement omitted]

[fol. 56] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 159

THOMAS PAPER STOCK COMPANY, et al., Complainants,

v.

CHESTER BOWLES, Price Administrator, Respondent

ANSWER—Filed October 16, 1944

Now comes Chester Bowles, Price Administrator of the Office of Price Administration, Respondent, by his duly authorized attorney, and pursuant to Rule 16 of the Rules of this Court, answers to the complaint of Thomas Paper Stock Company, a corporation, and Alvin E. Sandroff, President of Thomas Paper Stock Company, Complainants herein.

For the purposes of the proceedings on the complaint, Respondent admits or denies or otherwise pleads to the allegations of the complaint as follows:

1. Respondent admits the allegations of sections 1, 2, and 3 of the complaint.

2. In reply to the first paragraph of section 4 of the complaint, Respondent admits that Complainants have been aggrieved by the denial of their protest and that the Administrator refused to recognize any illegality in Section 1347.14 (d) of Maximum Price Regulation No. 30.

[fol. 57] 3. Respondent states that he does not have sufficient knowledge or information to form a belief as to the truth of the allegations of the first two sentences of the third paragraph of section 4 of the complaint.

4. Respondent denies the allegations of the third sentence of the second full paragraph of section 4 of the complaint.

5. Respondent denies the allegations of the third full paragraph of section 4 of the complaint so far as such allegations may be deemed to be allegations of fact.

6. In answer to the last paragraph of section 4 of the complaint, Respondent affirmatively states that there are pending against Complainants in the United States District Court for the Northern District of Illinois, Eastern Division, a criminal indictment (No. 43 C 1735) and a civil action in which the Administrator is requesting an injunction and $582,000 in damages (No. 44 C 760), arising out of violations of Maximum Price Regulation No. 30 under the Emergency Price Control Act of 1942, as amended. There is also pending in the said District Court an application by the Price Administrator for a subpoena compelling the present Complainants to produce certain records (No. C 44 C 857). In addition, on August 18, 1944, a warning notice was sent to Complainants pursuant to the provisions of Section 205 (f) (2) of the Emergency Price Control Act of 1942, as amended, based on violations of Maximum Price Regulation No. 30. The actions instituted by the Price Administrator against Complainants pursuant [fol. 58] to Section 205 of the Emergency Price Control Act of 1942 involve violations of the provisions of Section 1347.14 (d) of Maximum Price Regulation No. 30 as well as other provisions of the regulation.

7. In reply to the first paragraph of section 5 of the complaint, Respondent states that prior to December 28, 1943, Section 1347.14 (d) of Maximum Price Regulation No. 30 read as quoted by Complainants. Respondent further states that on December 28, 1943, said Section 1347.14 (d) was amended by the Price Administrator so as to read:

> The maximum prices for sales of unsorted wastepaper to any person shall not exceed the maximum price prescribed by this regulation for "No. 1 mixed paper," regardless of the grades and quantity of each grade contained in such unsorted wastepaper.

Respondent admits that the objection against Section 1347.14 (d) of Maximum Price Regulation No. 30 raised in Complainants' protest was that said subsection was in contravention of the so-called Taft Amendment to the Emergency Price Control Act of 1942.

8. Respondent denies the allegations of paragraph (a) of section 5 of the complaint, so far as that paragraph may be deemed to contain allegations of fact.

9. In reply to paragraph (b) of section 5 of the complaint, Respondent affirmatively states that on September 11, 1943, he issued a Supplementary Statement of Considerations Involved in the Issuance of Maximum Price Regu-
[fol. 59] lation No. 30, which is set forth at pages 10-12 of the Transcript of the Proceedings Before the Price Administrator.

10. Respondent affirmatively states that the other allegations of the complaint are argumentative and involve conclusions of law to which Respondent should not be required to plead. To the extent that the other allegations of said complaint may be treated as allegations of fact, Respondent denies such allegations.

Wherefore, Respondent prays that the complaint be dismissed.

Respectfully submitted, Richard H. Field, General Counsel

September, 1944.

[fol. 64] [Stamp:] United States Emergency Court of Appeals. Filed Aug. 26, 1944. Herman C. Beasley, Clerk.

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 159

THOMAS PAPER STOCK COMPANY and ALVIN E. SANDROFF, Complainants,

vs.

CHESTER BOWLES, Price Administrator, Respondent

REQUEST FOR HEARING AT CHICAGO, ILLINOIS

Complainants, by their attorneys, hereby respectfully request that the hearing in the above entitled cause be held at Chicago, Illinois.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants, 231 South LaSalle Street, Chicago, Illinois.

[fol. 65] [Stamp:] United States Emergency Court of Appeals. Filed Nov. 3, 1944. Herman C. Beasley, Clerk.

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 159

THOMAS PAPER STOCK COMPANY, et al., Complainants,

v.

CHESTER BOWLES, Price Administrator, Respondent

MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF

Complainants, by their attorneys, respectfully move that the time within which they may file a reply brief in the above-entitled cause may be extended to and including November 25, 1944, and in support of this motion they say:

1. Under Rule 21 (c) the time within which complainants may file a reply brief expires November 11, 1944.

2. The time is insufficient for the preparation and filing of a reply brief because:

(a) Although complainants' original brief is only thirteen pages in length, the Price Administrator has

filed a brief of thirty-two pages, containing new arguments which were not advanced by him in his opinion [fol. 66] accompanying the order denying complainants' protest. For example, the Administrator now predicates certain arguments upon Section 204 (e) of the Act, as amended June 30, 1944, although no such argument was relied upon in the opinion accompanying the order denying protest, which opinion was issued July 29, 1944. Complainants' attorneys require additional time for research upon such new points raised by the administrator.

(b) Complainants' attorneys are required to keep other engagements with Government war agencies, the time for which was set prior to the filing of the Administrator's brief herein. Among such engagements is a meeting with the War Department Price Adjustment Board which is set in Washington for November 10, 1944, and which will require time-consuming preparation before that date. Complainants' attorneys also have to meet deadlines during the next [fol. 67] ten days in the filing of briefs and contested matters, and the filing of pleadings, in other cases to which the Price Administrator is a party.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants.

[fol. 68] [Stamp:] United States Emergency Court of Appeals. Filed Nov. 3, 1944. Herman C. Beasley, Clerk.

UNITED STATES EMERGENCY COURT OF APPEALS

No. 159

THOMAS PAPER STOCK COMPANY, et al., Complainants,

v.

CHESTER BOWLES, Price Administrator, Respondent

ORDER

Upon consideration of Complainants' motion for enlargement of time to and including November 25, 1944, within

which to file their reply brief, and counsel for Respondent having stated orally that he has no objection thereto,

It is Ordered that Complainants' motion be, and it hereby is, granted.

By the Chief Judge.

Teste: Herman C. Beasley, Clerk.

November 3, 1944

[fol. 69] [Stamp:] United States Emergency Court of Appeals. Filed Nov. 30, 1944. Herman C. Beasley, Clerk.

UNITED STATES EMERGENCY COURT OF APPEALS

No. 159

THOMAS PAPER STOCK COMPANY and ALVIN E. SADOFF, Complainants,

v.

CHESTER BOWLES, Price Administrator, Respondent

ORDER

It is ordered that the Complaint in the above entitled case be assigned for hearing and determination to a division of the Court consisting of Chief Judge Maris, Judge Lindley, and Judge Laws.

———, C. J.

November 30, 1944.

[fol. 70] Thursday, November 30, 1944.

Pursuant to adjournment and call of the Chief Judge, the Court met at 1:34 P. M., at Chicago, Illinois.

Before Honorable Albert B. Maris, Chief Judge; Honorable Walter C. Lindley and Honorable Bolitha J. Laws, Associate Judges.

No. 159

THOMAS PAPER STOCK COMPANY, et al., Complainants,

v.

CHESTER BOWLES, Price Administrator, Respondent.

Argument commenced by Mr. Jack H. Oppenheim for the Complainants; continued by Mr. Nathaniel L. Nathanson for the Respondent, and concluded by Mr. Jack H. Oppenheim for the Complainants.

[fol. 64] IN UNITED STATES EMERGENCY COURT OF APPEALS

No. 159

THOMAS PAPER STOCK COMPANY, et al.,

v.

CHESTER BOWLES, Price Administrator

Heard at Chicago November 30, 1944

Decided March 27, 1945

Mr. Jack H. Oppenheim, with whom Mr. David L. Bazelon was on the brief, for complainants.

Mr. Nathaniel L. Nathanson, Associate General Counsel, with whom Messrs. Richard H. Field, General Counsel, Jacob D. Hyman, Chief, Court Review Price Branch, and Miss Josephine H. Klein, Attorney, all of the Office of Price Administration, were on the brief, for respondent.

Before Maris, Chief Judge, and Lindley and Laws, Judges

OPINION

MARIS, Chief Judge:

On June 15, 1944 the complainants filed a protest with the Price Administrator against Maximum Price Regulation No. 30, Wastepaper, as applied to unsorted wastepaper dealt in by them. Their protest was denied on July 29, 1944 and on August 26, 1944 they filed their complaint in this court. On December 17, 1943 the complainants had been indicted in the United States District Court for the Northern District of Illinois for violations of MPR 30. On June 29, 1944 the Price Administrator instituted against the complainants in that court a civil action for treble damages and an injunction. Both proceedings involved sales of unsorted wastepaper alleged to have been made between July 16th and September 11, 1943 at more than the maximum price fixed by MPR 30. Both proceedings are still pending.

Maximum Price Regulation No. 30[1] established ceiling

[1] Issued November 21, 1942, 7 F. R. 9732.

prices for wastepaper. Subsection (d) of Section 1347.14 of the Regulation established ceiling prices for unsorted wastepaper. It is this provision of the Regulation to which complainants' protest was directed. In its present form[2] Section 1347.14(d) reads:

> "The maximum prices for sales of unsorted wastepaper to any person shall not exceed the maximum price prescribed by this regulation for 'No. 1 mixed [fol. 65] paper,' regardless of the grades and quantity of each grade contained in such unsorted wastepaper."

The complainants protested Section 1347.14(d) upon two grounds. Both are based upon the fact that the section fixes the maximum price for a type of wastepaper, unsorted wastepaper, in terms of a specification or standard, "No. 1 mixed paper,"[3] and that for this reason the provision runs afoul of Subsection (j) of Section 2 of the Emergency Price Control Act of 1942, known as the Taft amendment, which was enacted on July 16, 1943.[4] The subsection reads as follows:

> "(j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency."

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[2] As amended December 28, 1943, 8 F. R. 17483.

[3] The specifications for No. 1 mixed paper are given in the Regulation.

[4] By Section 5(a) of Joint Resolution of July 16, 1943, 57 Stat. 566, 50 U. S. C. A. App. § 902(j).

The first objection which was asserted by the complainants in their protest to support their contention that the Regulation is invalid is based upon the legal premise that the Administrator is prohibited by the Taft amendment from establishing maximum prices by the use of a standard or specification in the absence of one of the two conditions described in clause (4) of Section 2(j). They reason that clauses (3) and (4) of Section 2(j) are to be construed as wholly separate and independent provisions, that clause (4) absolutely prohibits the use of specifications or standards in connection with the fixing of maximum prices unless they (a) were prior to the Regulation "in general use in the trade or industry affected" or (b) "have previously been promulgated and their use lawfully required by another Government agency." They assert that the section of the Regulation under attack involves the use of a specification or standard within the meaning of Section 2(j), that prior to the Regulation the specification or standard in question was not in general use in the wastepaper industry and that it had not previously been promulgated and its use required by another Government agency.

The Administrator's answer to the complainants' contention is that, conceding the facts to be as asserted by the [fol. 66] complainants,[5] there is a third situation in which

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[5] In his supplementary statement of considerations to Maximum Price Regulation No. 30, issued September 11, 1943, the Administrator said:

> "In one respect, Maximum Price Regulation No. 30 may be deemed to effectuate a standardization not heretofore known in the industry. Section 1347.14(d) provides that the maximum price for unsorted paper sold to a consumer shall not exceed the maximum price prescribed by the regulation for 'No. 1 mixed paper.' This was not the practice in the industry prior to price control. Prior to price control, unsorted paper was rarely sold to a consumer, but whenever it was the price varied depending upon the materials contained in the lot of unsorted paper. Maximum Price Regulation No. 30 penalizes sellers upon their sales of unsorted paper to a consumer. This provision affects a very small percentage of the industry's total volume and is

Section 2(j) authorizes him to make use of specifications or standards for the purpose of fixing maximum prices. This, he says, is the situation described in clause (3) of Section 2(j), which clause expressly authorizes him to standardize a commodity if he determines that no practicable alternative exists for securing effective price control with respect to such commodity. It is the Administrator's contention that clauses (3) and (4) of Section 2(j) are to be read together as providing three alternative situations in any one of which he is authorized to employ specifications or standards in connection with price control.

The construction which the Administrator seeks to place upon Section 2(j) was assumed in Avon Western Corporation v. Bowles, 145 F. 2d 473, (E. C. A. 1944); and in United States v. Pepper Bros., 142 F. 2d 340 (C. C. A. 3, 1944). We think it is correct. While it is true that clauses (3) and (4) are arranged in the subsection in the disjunctive and are, therefore, susceptible to the construction sought to be placed upon them by the complainants we are satisfied that such a construction would leave clause (3) without any practical meaning or effect. For the Administrator's function is to control prices—not to standardize commodities. Any standardization of commodities in which he indulges may only be in connection with and for the purpose of making more effective his control of prices. Therefore, if clause (3) is construed merely to authorize him to establish standards but not to apply them to practical use in his price control regulations it is wholly meaningless. Indeed the complainants frankly admit that this will be the result if we accept their contention that the Administrator may not utilize a standard for price control, unless one of the conditions described in clause (4) is present. Such a construction would clearly violate one of the primary canons of statutory construction.[6]

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absolutely *necessary* in order to secure effective price control with respect to waste paper."

Pike and Fischer OPA Price Service, Building Materials & Paper, Vol. 1, pp. 20135-20137.

[6] "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2 Sutherland Statutory Construction (3rd Ed.) § 4705.

In fact clause (3) bears internal evidence that the standardization which it authorizes the Administrator to make was intended to be used in connection with price control. The authority which the clause gives to take such action is expressly limited to those cases where there is no other practicable alternative for effective price control. The inference is plain that the standardization when authorized is to be employed in order to secure effective price control.

Moreover the construction of the two clauses which is contended for by the Administrator is amply supported by the legislative history of the Taft amendment. Shortly [fol. 67] before the enactment of the amendment a proviso had been inserted in the National War Agency Appropriation Act, 1944,[7] which made appropriations for the Office of Price Administration. The proviso was as follows:

> "Provided further, That no part of this appropriation shall be used for the promulgation or enforcement of orders requiring grade labeling or standardization of food products, wearing apparel or other processed or manufactured commodities or articles."

Immediately after the enactment of this proviso the Administrator raised the question that it would be too drastic in its effect upon existing price regulations in which he had utilized standards for price control purposes. His views in this regard having been communicated to the Committee on Banking and Currency of the Senate, the Committee proposed to the Senate that it add to a joint resolution which was then under consideration an amendment which would modify and clarify the ban upon grade labeling and standardization contained in the Appropriation Act which had just been passed. The amendment proposed by the Committee would have added to Section 2 of the Emergency Price Control Act a new subsection (j) as follows:

> "Nothing in this Act shall be construed (1) as authorizing the elimination of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; or (3) as authorizing the Administrator to standardize any commodity unless the Administrator shall determine with respect to such standardization that no practicable alternative exists for securing effective price control with respect to such

[7] 57 Stat. 522, 526.

commodity, but no order of the Administrator shall be deemed to require standardization because it fixes maximum prices, for different kinds, classes or types of a commodity, which are described in terms of specifications or standards, if such specifications or standards were prior to such order in substantial use in the trade or industry affected or have been established by another Government agency."

When this proposed amendment came up for consideration in the Senate Senator Taft offered on the floor a substitute amendment in the exact phraseology of subsection (j) as finally enacted and his substitute was adopted in lieu of the committee amendment. In this connection Senator Taft stated to the Senate:

"Mr. Taft. Mr. President, as the Senate will remember, in one of the appropriation bills we included a very tight provision against grade labeling and the elimination of trade names. The amendment was inserted on the floor of the House. The language used was not very apt for the purpose.

"Price Administrator Brown came before the committee and urged that it would seriously hamper his price regulations in a number of trades, regulations for which had already been issued, to many of which there was no objection. He submitted another form of amendment, carrying out the same purpose, but making it perfectly clear that it would not interfere with those regulations, which are proper.

[fol. 68] "That amendment was submitted to those in the House who drafted the original amendment. It was submitted to the representatives of the canners, who had strenuously objected to the effort to eliminate grade names. The amendment as I now offer it is only slightly different from the committee amendment. It meets with the agreement of the Price Administrator and of all the trades which have been directly interested."[8]

Under the language of the committee amendment, which was superseded by the Taft amendment, it is quite clear that the Administrator could have employed standards if

[8] 89 Cong. Rec. 7327, July 6, 1943.

he found that no practicable alternative existed for securing effective price control with respect to a given commodity even though such standards had never before been used by the industry or prescribed by another Government agency. Senator Taft assured the Senate that his substitute was "only slightly different" from the committee amendment. Following his statement his amendment was substituted and adopted. The difference between the two amendments which is now suggested by the complainants is a fundamental one which the legislative history demonstrates was not contemplated by the Senator who proposed the amendment or by the Congress which adopted it.

It must, therefore, be concluded that the Taft amendment did not invalidate Section 1347.14(d) of MPR 30 merely because the specification or standard employed by that section had not previously been used by the wastepaper industry or required by another Government agency.

The complainants asserted a second objection in their protest. It was that even if clause (3) of Section 2(j), the Taft amendment, be construed as authorizing the Administrator to employ specifications or standards for the purpose of fixing maximum prices of a commodity whenever he determines that no practical alternative exists for securing effective price control with respect thereto, the fact is that in the present case he did not make such a determination until September 11, 1943.[9] Consequently, they say, Section 1347.14(d) of MPR 30 was by force of the Taft amendment invalid and ineffective between July 16, 1943, the date of enactment of that amendment, and September 11, 1943, the date of the Administrator's deter-

[9] On September 11, 1943, the Administrator issued supplementary Order No. 64 (8 F. R. 12554) by which he amended the preamble to MPR 30 by adding thereto the following sentence: "Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation."

mination. This, it will be recalled, was the period during which the complainants are alleged in the pending enforcement proceedings to have violated the Regulation. For the purposes of this objection the complainants concede that Section 1347.14 (d) became valid and unassailable after September 11, 1943, by reason of the Administrator's formal determination that the use of the standard in question was necessary because no practical alternative existed for securing effective price control with respect to waste-paper.

[fol. 69] We think that this objection was not available to or properly included by the complainants in their protest to the Administrator because it involved a ground of invalidity which did not exist when the protest was filed, having admittedly been corrected and cured by the Administrator more than nine months previously.

The protest procedure which the complainants followed in this case was provided for by Section 202 of the Emergency Price Control Act. Its primary purpose is to afford to a person subject to a provision of a regulation or order which he believes to be invalid the opportunity to present his objections thereto to the Administrator and to request its modification or rescission in order that he may not have to obey it in the future. This is not to say that in a protest attacking the validity of a regulation or order and asking for its modification or rescission for the future the protestant may not also ask that the relief thus requested be made retroactive so as to be available for his defense in an enforcement proceeding. Nor is it to say that the Administrator may not grant such a request in a proper case. On the contrary the Administrator has assumed that he has the power to give retroactive effect to the modification or revocation of a regulation[10] and he has actually

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[10] Supplementary Order No. 40 issued by the Price Administrator (8 FR 4325, OPA Service—1 Gen., 8351) provides in part:

> "The repeal, revocation, amendment or other modification of a price regulation or any part thereof shall not have the effect to release or extinguish any penalty or liability incurred under such price regulation *unless otherwise expressly provided* but such price regulation or part thereof shall be treated as remaining in

exercised the power to do so.[11] What we do say is that this power is purely incidental to the Administrator's power to deal with an existing regulation and that it cannot be invoked by a protest which merely requests retroactive relief based upon an objection to a regulation which has already been met by its modification or rescission. The duty imposed upon the Administrator by the Act is to establish and maintain price and rent regulations which are generally fair and equitable and which effectuate the purposes of the Act to stabilize prices and rents and to control inflation. If the Administrator finds that a regulation does not meet the statutory standards it is his duty to modify or rescind it and if necessary to substitute another one which does meet those standards. In performing this duty he may, if appropriate, make his action retroactive. The Act, however, does not contemplate that he may be wholly diverted from his all important administrative task of price control for the sole purpose of performing the unrelated judicial task of determining the effect of past regulations upon the rights and liabilities of private individuals.

[fol. 70] The fact that the limitation of sixty days imposed by the original Act upon the filing of a protest did

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force for the purpose of allowing or sustaining any proper suit, action, prosecution or proceeding with respect to such penalty or liability." [Emphasis supplied.]

In his statement of considerations (OPA Service—1 Gen., 8355) the Administrator said that this order was issued "to make it clear that changes in price regulations do not, *unless otherwise expressly provided*, release or extinguish any penalty or liability incurred prior to the changes." [Emphasis supplied.]

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[11] See for example Supplementary Order No. 7, 7 FR 5176, OPA Service—1 Gen., 8141, and Supplementary Order No. 35, 8 FR 1449, OPA Service—1 Gen., 8321. See also MPR 425, Amendment No. 11, 9 FR 13857, OPA Service—1 Food, 6538; MPA 425, Amendment No. 12, 9 FR 14437, OPA Service—1 Food, 6539; MPR 493, Amendment No. 5, 9 FR 2288, OPA Service—1 Food, 13,837.

not apply to a protest such as the one now before us which was based upon new grounds arising after the issuance of the regulation, as we held in R. E. Schanzer, Inc. v. Bowles, 141 F. 2d 262 (1944), does not mean that there is no limitation whatever upon the time within which an objection to a regulation or order must be presented to the Administrator in a protest. On the contrary, as we have seen, the very nature of the protest procedure involves such a limitation. Accordingly when the Act as it has now been amended, provides that "At any time after the issuance of any regulation or order * * * any person subject to any provision of such regulation, order * * * may * * * file a protest specifically setting forth objections to any such provision * * *" it must be construed to mean that a protest setting forth an objection to a provision of a regulation or order may be filed at any time while the protested provision is still in force and open to the objection and is thus subject to modification or rescission by the Administrator as requested by the protestant if the objection is found to be well taken. Any other construction would lead to the result that a protest might be filed under the Act after it was too late to secure any action upon the objection which it raises, an obviously futile procedure.

It follows that the second objection relied upon by the present complainants was not presented to the Administrator in a protest filed in time to enable him to consider and act upon it. Being thus untimely the Administrator properly refused to grant the complainants' request for retroactive relief based upon it. Moreover because the objection was not timely presented to the Administrator it may not be considered by this court in support of the present complaint. That complaint was filed under Section 204(a) by the express terms of which this court may not consider any objection urged in support of the complaint unless the objection was set forth by the complainant in the protest.[12] This can only mean an objection properly and timely set forth in a protest so that the Administrator has power to act upon it; not an untimely objection which

[12] Sec. 204(a) of the Emergency Price Control Act provides that "No objection to such regulation, * * * shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest * * *"

presents no present question with respect to any existing regulation or order. For, as we have indicated, Sections 203 and 204 disclose the statutory intent that the protest procedure is to be used only with respect to subsisting regulations and orders and then only to raise objections with respect to which the Administrator may still grant prospective relief.

It does not follow, however, that the complainants by their failure to file a timely protest with respect to their second objection have lost the possibility of securing retroactive relief based upon that objection if they can show good faith and excuse their delay in presenting it. All courts of the United States are empowered by the Declaratory Judgments Act, Section 274D of the Judicial Code,[13] to declare rights and other legal relations of a complainant with respect to a party and a subject matter within their jurisdiction, whether or not further relief is or could be prayed. The Stabilization Extension Act of 1944 by its addition of subsection (e) to Section 204 of the original [fol. 71] act has made it clear that this court may exercise the power thus conferred to make a determination as to the validity of a regulation or order which will have retroactive effect as of a time in the past when the regulation was alleged to have been violated. This appears from the following provision of Section 204(e):

> "If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204(b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision."[14]

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[13] 28 U. S. C. A. §400.

[14] The scope of the quoted provision is not cut down by the final clause of subsection (e) to the effect that "except as provided in this subsection" no retroactive effect shall be given to any judgment setting aside a provision of a regulation, order or price schedule. The only provision for such retroactive effect which is contained in the subsection is the one quoted in the text and it must, therefore, be the one referred to in the final clause as excepted from its prohibition against retroactive effect.

[fol. 72] Paragraph (1) of Section 204(e) affords a remedy to a person who has excusably failed to present an objection to a regulation by way of protest while the regulation was in force and open to the objection but who nevertheless shows that he needs for his defense in an enforcement proceeding a determination of the validity of the regulation as of the time when he is charged with having violated it. The paragraph provides that within the periods of time which it stipulates a defendant in any civil or criminal proceeding involving an alleged violation of any price

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The legislative history of the Stabilization Extension Act demonstrates that this is the proper construction to be placed upon the final prohibitory clause of subsection (e). The clause first appeared in the Senate bill (S. 1764, 78th Cong., 2d Sess.) in connection with a provision for retroactive effect which was limited to criminal cases. The pertinent language of subsection (e) as proposed by that bill was as follows:

> "If any provision of a regulation, order or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204(b), any *criminal* proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except * * *; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206." [Emphasis supplied.]

The final prohibitory clause of this Senate version of subsection (e) was quite obviously intended to make clear that the judgments of this court should not be given retroactive effect in civil enforcement proceedings for injunctions or treble damages or in any other case except a criminal proceeding for violation of a provision of a regulation or order determined by this court to be invalid.

In the bill as passed by the House of Representatives the provision of the proposed subsection (e) for retroactive effect was made applicable to any proceeding or

or rent regulation or order may apply to the court in which the proceeding is pending for leave to file in this court a complaint setting forth objections to the validity of any provision which the defendant is alleged to have violated. It is further provided that the court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with Section 203(a).

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judgment, civil or criminal, based upon violation of a provision of a regulation, order or price schedule determined by this court to be invalid and the final prohibitory clause of the Senate bill was omitted as unnecessary. In the bill as agreed on in conference between the two houses and as finally enacted the broad provisions of subsection (e) for giving retroactive effect to judgments of this court in all enforcement proceedings, civil as well as criminal, which the House of Representatives had adopted, were retained. The final prohibitory clause of the Senate bill was also included, however. No reason for including it was given, either in the statement made by the House conferees in the conference report (House Report, 1698, 78th Cong. 2d Sess.) or in the statement made by Senator Wagner, the chairman of the Senate conferees, on the floor of the Senate in explanation of the conference report (90 Cong. Rec. pp. 6449-6452). In the absence of any other explanation it must be presumed that the conferees thought it useful to retain the prohibitory clause for reasons similar to those which brought about its original inclusion in the Senate bill in the first place, namely, in order to make clear that the judgments of this court should not be given retroactive effect in any judicial proceeding except those in which such effect was expressly authorized to be given by the preceding provision of the subsection. While those proceedings had been broadened to include all enforcement proceedings, civil as well as criminal, the conferees may well have had in mind that a judgment of this court determining a regulation or order to be invalid might be sought to be given retroactive effect in pending private litigation or even in the interpretation or enforcement of an existing private contract.

In Montgomery Ward & Co. v. Bowles, — F. 2d — (E. C. A. 1945), the jurisdiction of this court was invoked by a complaint filed under Section 204(a) following the denial of a protest and while the protested regulation was still in force. We held in that case that this court had power to make a declaration as to the validity of the regulation in question at the request of the complainant who had been charged with having violated it even though because of the revocation of the regulation by the Administrator while the complaint was pending we no longer could grant affirmative relief with respect to it. This court has like power to determine the validity of a regulation which a complainant is alleged to have violated when its jurisdiction is invoked by a complaint filed under Section 204 (e)(1) with leave of court. In either case if the determination of this court is that the provision is invalid Section 204(e) requires that the enforcement proceeding pending against the defendant shall be dismissed and any judgment entered against him shall be vacated to the extent that such proceeding or judgment is based upon violation of the provision determined to be invalid.

It may be suggested that the remedy afforded by Section 204 (e)(1) is not available to the present complainants with respect to the civil action pending against them because that section refers only to a situation in which the defendants in an enforcement proceeding have not presented their objection to the Administrator in a protest filed prior to the institution of the proceeding against them whereas the complainants did present their objection in such a protest. The answer to such a suggestion is that when the section speaks of "the defendant's failure to present such objection in a protest filed in accordance with section 203(a)" it refers to the presentation to the Administrator in a protest of an objection to an existing regulation or order in time to permit the Administrator to grant relief to the protestant with respect to the objection and not to an untimely objection as in the case now [fol. 73] before us. Since, as we have seen, the present complainant's second objection had already been met and cured by the Administrator before it was presented to him in the protest filed on June 15, 1944, the complainants, so far as concerns the remedy afforded by Section 204(e)(1), are in the same position as though they had never presented that objection to the Administrator in a protest.

The construction which we have thus placed upon the provision in Section 204(c)(1) requiring the showing of a "reasonable and substantial excuse for the defendant's failure to present such objection in a protest" gives a rational meaning in harmony with the general scheme of the Emergency Price Control Act as amended by the Stabilization Extension Act to a provision which if literally construed would operate most unjustly. For if the provision were to be construed literally it would deprive defendants in the situation of these complainants with respect to the civil action pending against them of any opportunity to procure an adjudication of the invalidity of the regulation even though they were able to show good faith and due diligence. For their filing of a protest after the invalidity of the regulation had been cured by modification or rescission, although not enabling them to secure relief from the Administrator or on review from this court, would nevertheless bar them from making application for the right to secure relief in this court under Section 204(e)(1).

We cannot think that Congress intended any such result. On the contrary the Act as amended may fairly be construed to afford a comprehensive and well rounded plan of procedure for obtaining relief against invalid provisions of regulations and orders of the Administrator. It may be helpful at this point to outline the scope of that procedure as we understand it.

For a person subject to an invalid provision of a regulation or order who has complied with it in the past but desires to have it set aside prospectively the protest procedure of Section 203 is available. He may by protest bring his objections to the attention of the Administrator and seek relief from that official by way of modification or rescission of the regulation or order in question. If the Administrator denies him relief he may invoke the jurisdiction of this court under Section 204(a) to set the regulation or order aside in whole or in part.

A person subject to an invalid provision of a regulation or order who has violated it in the past and who is, therefore, subject to enforcement proceedings, whether or not actually instituted, may wish in addition to prospective relief to have a determination of the validity of the provision as of the time he violated it in order to establish the defense of invalidity in the enforcement proceedings

brought or threatened against him. A person who desires to institute proceedings to establish the invalidity of the provision of the regulation or order may find himself in one of the three following situations: (1) the provision of the regulation or order which he has violated may still be in force and open to the objection which he seeks to raise but enforcement proceedings may not yet have been actually instituted against him; (2) the provision of the regulation or order which he has violated may still be in force and open to the objection which he seeks to raise and enforcement proceedings may have been actually instituted against him; or (3) the provision of the regulation or order which he has violated may no longer be open [fol. 74] to the objection which he seeks to raise because it has been modified or rescinded but enforcement proceedings have been or may still be instituted against him.

In the first class of cases the person who desires an opportunity to establish the invalidity of the provision of the regulation or order for purposes of his defense may have that opportunity in a protest proceeding brought under Section 203 to be followed if necessary by a complaint in this court under Section 204(a). While such a protest proceeding must, as we have seen, primarily be directed toward securing prospective relief against the provision of the regulation or order alleged to be invalid by its modification or rescission, the protestant may ask to have that relief made retroactive, and the Administrator may grant his request. If upon such a request the Administrator should refuse to give retroactive relief even though giving relief for the future his action would be a partial denial of the protest which would open the way for the filing of a complaint under Section 204(a) upon which we would be empowered to grant retroactive relief by way of a declaratory judgment. Accordingly in this class of cases retroactive relief may be obtained from the Administrator upon a proper showing in a protest proceeding or, if he denies it, such relief may be obtained from this court in a proceeding under Section 204(a).

In the second class of cases the person who seeks to establish the defense of invalidity has the choice of two remedies. He may as of right but without staying the prosecution of the enforcement proceeding follow the protest and review procedure of Sections 203 and 204(a) which we have already described, or if he desires to secure a stay of the

prosecution of the enforcement proceeding he may make application to the court in which that proceeding is pending for leave to file a complaint in this court under Section 204(e)(1) without having previously filed a protest.

A person who finds himself in the third class of cases may, after an enforcement proceeding has actually been instituted against him, make application for leave to file a complaint in this court under Section 204(e)(1). He is, however, restricted to that remedy since by his failure to raise the question of validity in a protest filed while the regulation or order was in force and open to the objection which he seeks to raise, he has lost the right to secure relief through the protest and review procedure of Sections 203 and 204(a). This is because the Stabilization Extension Act has not changed the primarily prospective nature of the protest procedure of Section 203. Moreover such a person may only request leave to file a complaint under Section 204(e)(1) after an enforcement proceeding is actually commenced against him. Since in such a case the regulation or order is no longer open to his objection there is no need to litigate its past validity unless an enforcement proceeding makes it necessary to decide the question.

Under the statutory procedural plan which we have outlined it is clear that the complainant's first objection falls within the first class while their second objection falls within the third class. It follows that in this proceeding brought upon the denial of complainants' protest we have power to consider and dispose of complainants' first objection upon the merits, as we have done, but that we do not have similar power with respect to the second objection. [fol. 75] We may consider that objection upon its merits only if and when a complaint asserting it is filed under Section 204(e)(1) with leave of the United States District Court for the Northern District of Illinois after the complainants satisfy that court that the objection is asserted in good faith and that there is reasonable and substantial excuse for the complainants' failure to present it in a protest filed before September 11, 1943. In view of the doubt which has existed as to the timeliness of the presentation of this objection in the protest filed June 15, 1944 it is quite clear that the District Court would be abundantly justified in finding that the complainants have such an excuse.

A judgment will be entered dismissing the complaint.

Concurring Opinion

Lindley, Judge, concurring:

I concur with Judge Maris' opinion. However, in view of Judge Laws' dissent I deem certain observations pertinent. It may well be that under the facts presented here complainants would have had no remedy as to their second objection before the enactment of the Stabilization Extension Act of 1944 and, thus, as Judge Laws indicates, if our conclusion is correct, would have had cause to assert deprivation of due process. However, it seems to me, Congress has remedied this situation by incorporating Section 204(e)(1) into the Act, thereby creating a remedy to which we properly remand complainants.

My thought in this respect results largely from the whole tenor of the legislative history of the various provisions of the Stabilization Extension Act of 1944 which brought into the Price Control Act Section 204(e)(1). That history, as reflected by the annals of the committees and the debates in both Houses, seems to me to demonstrate clearly that the members of Congress, fearful lest, in the emergency facing them when they enacted the original legislation, which was intended to forestall inflation and to bring about stabilization of our economy in wartime, they had imperilled certain constitutional rights, sought to remove the threatening possibilities. As a result came the Stabilization Extension Act with its modifications of the original act and amendments thereto. By this legislation Congress put into formal expression its attempt to banish the threat of evil and at the same time not to impair the protection of the public welfare contemplated by the original act. Thus in the Senate Senator Danaher, after directing that body's attention to the fact that in the then recent opinion of Yakus v. United States, 321 U. S. 414, the Supreme Court had remarked that it had "no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face" and that it did not determine "whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid," said: "in what we have done we have perfected the two points as to which the Supreme Court has entered no decision, to the end that

there can be no question of the denial of or the existence of due process."

[fol. 76] I believe the proper conclusion to be that after a complete survey of the original act, full disclosure as to its possible defects and exhaustive discussion as to how best to avoid them, Congress enacted the amendments, intending to assure one in the position of complainants a right to be heard; that if, previously, complainants had no forum where they could present their second objection, they now enjoy such a right, by virtue of Section 204(e)(1) and that we have jurisdiction solely by way of the avenue of approach provided therein.

OPINION, DISSENTING IN PART

LAWS, Judge, dissenting in part:

I concur in the Court's disposition of the first objection set forth in complainants' protest, but dissent from that part of the opinion which decides that the second objection raised by complainants in their protest may not be considered in this case. The ruling of the Court, as I read it, is that notwithstanding a protest includes a claim of invalidity which, if sustained, might have a bearing upon the rights and liabilities of a protestant, such claim may not be passed upon by the Administrator in any case where at the time the protest was filed the regulation was not open to the objection sought to be raised. The reasoning is that the primary purpose of the protest proceeding is to afford prospective relief against control imposed upon prices, that while in some cases the Administrator may grant retroactive relief, such relief is purely incidental and the Act does not contemplate that the Administrator "may be wholly diverted from his all important administrative task of price control for the sole purpose of performing the unrelated judicial task of determining the effect of past regulations upon the rights and liabilities of private individuals." The right to claim this so-called "incidental" relief is recognized by the Court if at the time the protest was filed the regulation was open to the objections raised, but this right apparently is held to be cut off if the Administrator removes the basis of objection before a protest is filed.

We are dealing in this case with a question of interpreting the protest provisions of the Emergency Price Control Act of 1942, as they were when complainants filed their protest.

Complainants' protest was filed before the enactment of the Stabilization Extension Act of 1944, by which the Emergency Price Control Act of 1942 was amended. The amending Act, as I understand my brethren agree, brought about no change in the nature of the protest proceeding; but simply gave to District Courts and others in which enforcement actions were brought the right to authorize a defendant to file a complaint in this Court setting forth any objection found to be made in good faith and with respect to which the court should find there is reasonable and substantial excuse for the defendant's failure to present such objection in the regular protest procedure. Such an added right obviously can have no bearing upon the proper interpretation of the protest procedure of the Emergency Price Control Act of 1942 prior to its amendment.

I do not agree with the interpretation of the Court that the protest procedure was created by Congress to provide relief against future controls of prices, to the exclusion of other rights and liabilities of individuals. Such rights and [fol. 77] liabilities might be of importance equal to, if not greater than, the right to be relieved of price controls. Frequently a regulation has interfered with and has stricken down contracts affecting a protestant. In some instances, as in the case before us, enforcement proceedings, in the form of indictments for criminal violation of a regulation, suits to impose treble damages and suits for injunction, have been brought and are pending against a protestant. This Court is the only forum in which the invalidity of the regulation may be established. If not established in this Court, the possible effect of the invalidity of the regulation upon the rights and liabilities of the protestant may not be passed upon in other courts. The right to protest and obtain judicial review of regulations and orders issued by the Administrator was given for the benefit of individuals. I cannot believe Congress intended to give such benefit in respect only of future controls of prices and exclude the right to protest against past controls which might vitally affect rights and liabilities of individuals. I find nothing in the language of the Emergency Price Control Act of 1942 which so limits the protest and review procedure.

If it could be said without question that under the original Emergency Price Control Act of 1942 a judgment of invalidity would have had no significance in determining the

rights and liabilities of a protestant, arising before the protest was filed, my position in this case might be different. But it seems to me a judgment of invalidity well might have affected, indeed in some instances might have determined, some of such rights and liabilities.[1] As applied to the case before us it might have had such effect. I recognize that in an opinion of the United States Circuit Court of Appeals for the First Circuit, it was held that the invalidity of a regulation a defendant was charged with violating might not be decided in a criminal prosecution. Rottenberg v. U. S., 137 F. 2d 850 (1943); affirmed *sub nom.* Yakus v. U. S., 321 U. S. 414 (1944). But in that case the Court was not confronted with the question as to what effect a judgment of invalidity by the Emergency Court of Appeals would have if offered as a defense in a criminal case. The opinions of the Circuit Court of Appeals and the Supreme Court expressly left open the question of the right of a defendant in a criminal case to defend on the ground that the regulation is unconstitutional on its face. It seems that the same principle would control the case of a regulation invalid on its face and the case of a regulation duly invalidated by a judgment of this Court, and it might apply not only in criminal cases, but in proceedings for treble damages and injunctions, and perhaps in cases involving contracts affected by regulations. If not an absolute defense to a criminal case, a decision holding invalid a regulation a defendant was charged with violating might well have a decided influence upon the sentence to be imposed by the District Court. It would seem there would be one degree of wrong committed where the regulation was found fair and equitable and was wilfully violated and another degree of wrong where the regulation was held by a court of competent jurisdiction to have been unfair and inequitable or [fol. 78] arbitrarily or capriciously put into effect by the Administrator.

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[1] Under the Act as it now reads it is clear that a judgment of invalidity would be a complete defense in an enforcement action. Sec. 204(e)(2). This provision, however, was added by the Stabilization Extension Act and, as previously noted, we are dealing here with an interpretation of the Act prior to its amendment by the Stabilization Extension Act.

As I read the opinion of the Court, there is no question but that the right to protest exists except where it has been cut off by a change in the regulation before the protest is filed. The Court seems to indicate that thereafter a filing of a protest is "untimely". I disagree with this construction of the Act for several reasons. First, as stated by this Court in *Schanzer* v. *Bowles*,[2] there was no time limitation fixed by the Act upon the filing of a protest based on grounds arising, as in this case, more than sixty days after the issuance of a regulation. The majority opinion of the Court, however, has now introduced a new bar to complainant's protest, a bar of which they had no notice from the language of the Act. This bar may be raised at any time, without any notice, by one of the parties to the litigation. Second, the construction completely obstructs the right of judicial review, in spite of the existence of substantial rights dependent upon such review.[3] To me this is such a denial of a reasonable opportunity to be heard as to constitute an offense against the due process clause of the Constitution. Since the language of the Act did not require such an interpretation, I feel the Act should be construed so as to avoid this evil.

I have considered the practical aspects of the views expressed in this dissent. It may and probably will develop that the District Court will certify for our consideration the question in the case at bar, which the Court refuses to decide in the present proceeding. If so, complainants will not suffer except in the matter of additional cost, delay and the effort involved in bringing another suit. But in this case and in similar cases there is the hazard of the possible refusal of the District Court to authorize the filing of a complaint or to permit all objections to be heard. If complainants, as I feel they do, have the unqualified right to be heard in the Emergency Court of Appeals as to all their

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[2] 141 F. 2d 262 (E. C. A. 1944).

[3] It is no answer to state, as the Court does, that the provisions of the Stabilization Extension Act provide some right of review in the enforcement action. Such review lies in the discretion of the judge before whom the enforcement action is brought; it is not available as a matter of right. But the important point is that it did not exist under the original Act with whose interpretation we are here concerned.

objections, they should not be subjected to such hazard. I, therefore, believe it important in principle to hold that this Court should now pass upon an objection to the Regulation, which seems of great importance to complainants and which in my judgment they have presented in accordance with authority granted by the Emergency Price Control Act of 1942.

[fol. 86] [Stamp:] United States Emergency Court of Appeals. Filed Mar. 27, 1945. Herman C. Beasley, Clerk.

UNITED STATES EMERGENCY COURT OF APPEALS

No. 159

THOMAS PAPER STOCK CO., et al.,

v.

CHESTER BOWLES, Price Administrator

Present: Maris, C. J., and Lindley and Laws, JJ.

JUDGMENT

This cause came on to be heard on the Complaint and Answer, and on the Transcript of Proceedings before the Price Administrator, Office of Price Administration and was argued by counsel.

Upon consideration whereof, it is now here ordered and adjudged that the Complaint herein, be and it hereby is, dismissed.

It is further ordered that the Clerk of this Court transmit forthwith a certified copy of this Judgment to Chester Bowles, Price Administrator.

Dated March 27, 1945.

By the Division

Teste: Herman C. Beasley, Clerk.

[fol. 87] UNITED STATES EMERGENCY COURT OF APPEALS

I, Herman C. Beasley, Clerk of the United States Emergency Court of Appeals, hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 86, both inclusive, constitute a true copy of

(1) Transcript of Proceedings before the Price Administrator

(2) Complaint

(3) Answer of Respondent

(4) Proceedings in the United States Emergency Court of Appeals

in the case of:

No. 159

THOMAS PAPER STOCK COMPANY, et al., Complainants,

v.

CHESTER BOWLES, Price Administrator, Respondent

as the same remain upon the files and records of said United States Emergency Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Emergency Court of Appeals, at Washington, this 14th day of April, A. D. 1945.

Herman C. Beasley, Clerk, United States Emergency Court of Appeals, by J. Frederick Mattingley, Chief Deputy Clerk. (Seal.)

[fol. 81] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 4, 1945

The petition herein for a writ of certiorari to the United States Emergency Court of Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9465)

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 26 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 206 67

THOMAS PAPER STOCK COMPANY, ET AL.,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

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OCTOBER TERM, 1944.

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THOMAS PAPER STOCK COMPANY, ET AL.,
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vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, THOMAS PAPER STOCK COMPANY, a corporation, and ALVIN E. SANDROFF, petition this Court for a writ of certiorari to review a judgment of the United States Emergency Court of Appeals dismissing petitioners' complaint there, and in support of this petition respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

By the decision of the Emergency Court of Appeals, petitioners may be forced to trial as defendants in a criminal case, *under a price regulation which did not become valid until after the dates of violations alleged in the indictment.* The right accorded by the Emergency Price Control Act to have the regulation declared invalid, by means of the statutory protest procedure, has been cut off arbitrarily through a construction of the statute, which, in the language of the dissenting opinion of Judge Laws, *completely obstructs the right of judicial review.*

On June 15, 1944, petitioners filed a protest with the Price Administrator, pursuant to the provisions of § 203 of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. App. § 923, against Maximum Price Regulation No. 30, Wastepaper, 7 Fed. Reg. 9732, 8 Fed. Reg. 17483. Their protest was denied on July 29, 1944, and on August 26, 1944 they filed a complaint in the Emergency Court of Appeals pursuant to the provisions of § 204 (a) of the Act, 50 U. S. C. App. §924 (a).

On December 17, 1943, petitioners had been indicted in the United States District Court for the Northern District of Illinois for alleged violations of MPR 30. On June 29, 1944, the Price Administrator instituted against petitioners, in the same court, a civil action for treble damages and an injunction. Both proceedings involved sales of unsorted wastepaper alleged to have been made between July 16 and September 11, 1943, at more than the

maximum price fixed by MPR 30. Both proceedings are still pending.

Subsection (d) of § 1347.14 of the Regulation established ceiling prices on unsorted wastepaper. It is this provision of the Regulation to which petitioners' protest was directed. Section 1347.14 (d) reads:

> "The maximum prices for sales of unsorted wastepaper to any person shall not exceed the maximum price prescribed by this regulation for 'No. 1 mixed paper,' regardless of the grades and quantity of each grade contained in such unsorted wastepaper."

One of the grounds of the protest was that the subsection fixed the maximum price for a category of wastepaper, unsorted wastepaper, in terms of a specification or standard, "No. 1 mixed paper", and that for this reason the subsection ran afoul of § 2 (j) of the Act, known as the Taft amendment, 50 U. S. C. App., § 902, enacted July 16, 1943, from the latter date until September 11, 1943. Subsection (j) reads as follows:

> "(j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency."

The administrative determination required by subdivision (3) of the Taft amendment to be made before the commodity in question could be standardized, was not made until September 11, 1943.

The period between the date of the enactment of the Taft amendment, and the date on which the Price Administrator first determined that the standardization of unsorted wastepaper in terms of the standard, "No. 1 mixed paper", was essential for securing effective price control with respect to such commodity, is the period during which petitioners are alleged in the pending enforcement proceedings to have violated the Regulation.

On March 27, 1945, the Emergency Court of Appeals dismissed petitioners' complaint (Judge Laws dissenting) without determining the merits of the question thus raised. The ground assigned for dismissal was that the objection was not available to or properly included by petitioners in their protest to the Administrator because on the date the protest was filed, June 15, 1944, the Regulation was not open to the objection sought to be raised, since the asserted ground of invalidity no longer existed, the defect in the Regulation having been "corrected and cured" by the Administrator on September 11, 1943, when he first made the determination that there was no practicable alternative to standardization.

The reasoning of the majority opinion of the Emergency Court of Appeals is that the primary purpose of the protest proceeding is to afford prospective relief against control imposed upon prices; that while in some cases the Administrator may grant retroactive relief, such relief is purely incidental, and the Act does not contemplate that the Administrator "may be wholly diverted from his all important administrative task of price control for the sole purpose of performing the unrelated judicial task of determining the effect of past regulations

upon the rights and liabilities of private individuals". The right to claim this so-called "incidental" relief is recognized by the Court if at the time the protest was filed the Regulation was open to the objections raised. However, this right apparently is held to be cut off if the Administrator removes the basis of objection before a protest is filed, notwithstanding that no time limitation was imposed by the language of the Act with respect to the filing of a protest such as the one in question, which was based upon new grounds arising after the issuance of the Regulation (*R. E. Schanzer, Inc.* v. *Bowles*, 141 F. 2d 262), and notwithstanding that the Administrator had, subsequent to validating the Regulation, caused the indictment of persons whose alleged violations occurred prior to such validation. It was further held by the Court that because the objection was "not timely presented to the Administrator", it could not be considered by the Court, since § 204 (a) of the Act[1] provides that the Emergency Court of Appeals may not consider any objection

1. Section 204 (a) of the Act reads as follows:

"Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: Provided, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be con-

urged in support of the complaint unless the objection was set forth by the complainant in the protest.

The Court in its opinion suggested that petitioners have not necessarily lost the possibility of securing retroactive relief, since the Stabilization Extension Act of 1944, 58 Stat. 639, by its addition of subsection (e) to § 204 of the original Act, 50 U. S. C. § 924 (e), now affords a remedy to a person who has excusably failed to present an objection to a Regulation by way of protest while the Regulation was in force and open to the objection, but who nevertheless shows that he needs for his defense in an enforcement proceeding a determination of the validity of the Regulation as of the time when he is charged with having violated it. Paragraph (1) of § 204 (e) provides[1] that

sidered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court."

[1] Section 204 (e) (1) of the Act reads as follows:

"Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting

within the periods of time which it stipulates, a defendant in any criminal proceeding involving an alleged violation of a regulation may apply to the court in which the proceeding is pending, for leave to file in the Emergency Court of Appeals a complaint setting forth objections to the validity of any provision which the defendant is alleged to have violated. It is further provided that the court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with § 203 (a).

Inasmuch as the Stabilization Extension Act of 1944 was not enacted until after petitioners filed their protest with the Price Administrator, the effect of the Court's decision is to say that prior to the effective date of the Stabilization Extension Act of 1944 the Price Administrator at any time, without any notice, could obstruct the right of judicial review by "correcting" an invalid regulation which had not been protested prior to its "cor-

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forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection."

rection", in spite of the fact that subsequent to such "correction" the Administrator had caused the indictment of persons whose alleged violations occurred prior to such "correction".

The provisions of § 204 (e), added by the Stabilization Extension Act, afford no absolute right of judicial review. The review therein provided lies in the discretion of the court before whom the enforcement action is pending. In this case and in similar cases there is the hazard of the possible refusal of the District Court to authorize the filing of a complaint or to permit all objections to be heard. Petitioners assert that to be subjected to such hazard is to be deprived of due process of law.

II.

BASIS OF JURISDICTION

The judgment of the Emergency Court of Appeals sought to be reviewed was entered on March 27, 1945. The jurisdiction of this Court is invoked under § 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. App § 924(d).

III.

SPECIFICATION OF ERRORS TO BE URGED.

The Emergency Court of Appeals erred in the following respects:

1. In refusing to consider whether, and in refusing to declare that, the Regulation protested was invalid during the period July 16 to September 11, 1943.

2. In holding that the Price Administrator was not required to determine whether the Regulation was invalid during the period July 16 to September 11, 1943.

3. In holding that the Emergency Price Control Act prohibits the filing of a protest against a regulation after the claimed ground of invalidity has been "corrected or cured".

4. In holding that the Emergency Court of Appeals is not required to review the denial of such a protest.

5. In holding that a protest filed under § 203 of the Act, prior to the enactment of § 204(e)(1), is affected by the provisions of the latter subsection.

6. By holding that in the case at bar petitioners are afforded due process of law by the provisions of § 204 (e)(1) of the Act.

7. In construing the Act so as to leave it within the discretion of the District Court as to whether or not petitioners should be forced to trial under an *ex post facto* law.

IV.

QUESTIONS PRESENTED

1. Although the Regulation in question was validated, prospectively, before the protest was filed (but after the dates upon which petitioners are alleged in the indictment against them to have violated it) the first question presented is: *Did the Emergency Court of Appeals erroneously deny to the petitioners the right to have their protest considered on the merits under §§ 203 and 204 (a) of the Emergency Price Control Act, considering that the language of the Act imposed no time limitation upon the filing of the protest?*

2. Since the protest was filed prior to the enactment of the Stabilization Extension Act of 1944, which added §§ 204 (e)(1) to the Emergency Price Control Act, the second question presented is: *Is the legal status of the*

protest in any way affected by Section 204 (e)(1), and did the Emergency Court of Appeals erroneously hold that petitioners could assert the claimed ground of invalidity of the regulation only in a proceeding instituted pursuant to § 204 (e)(1)?

3. Since the review provided by § 204 (e)(1) lies in the discretion of the District Court before whom the indictment and civil enforcement action is pending, and is not available as a matter of right, the third question presented is: *In the case at bar, has the construction given §§ 203 and 204(a) of the Act by the Emergency Court of Appeals deprived petitioners of due process of law by denying to them, as a matter of right, administrative consideration of their protest and judicial review thereof on the merits by the Emergency Court of Appeals?*

4. Since the Emergency Court of Appeals has refused to consider, on the merits, whether the Regulation in question was not validated until after the dates of alleged violations specified in the indictment, the fourth question presented is: *Are not petitioners being subjected to prosecution under an ex post facto law, in violation of the constitutional prohibition against such laws?*

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Emergency Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question is one of public importance because it involves the interpretation of statutory procedural provisions which affect the constitutional rights of many people.

That the construction of the Act by the Emergency Court of Appeals countenances deprivation of due process, is illustrated by the following situation, analogous to the one in the case at bar:

(a) The Administrator may promulgate an invalid regulation.

(b) After the regulation has been extant for a period, he may validate it prospectively.

(c) After thus validating the regulation, he may cause a person to be indicted for violations alleged to have occurred during the period when the regulation was invalid.

(d) After the return of the indictment, he may refuse to entertain a protest then filed and directed against the regulation during the period when it was invalid, notwithstanding that there is no time limitation imposed by the language of the Act upon the filing of the protest.

(e) The protestant may, in the discretion of the District Court, be forced to trial under the indictment and be wholly denied an opportunity to have the invalidity of the regulation established by a judgment of the Emergency Court of Appeals, and also be precluded from asserting as a defense in the criminal trial the regulation's invalidity during the period when allegedly it was violated.

The foregoing situation may eventuate under the interpretation given the Act by the Emergency Court of Appeals, notwithstanding that there is nothing in the language of the Act which so limits the protest and review procedure. This is such a denial of a reasonable opportunity to be heard as to constitute an offense against the due process clause of the Constitution. Since the language of the Act does not require an interpretation leading to this result, this Court should interpret the Act so as to avoid an unconstitutional construction.

A further evil results from the construction made by the Emergency Court of Appeals. The situation outlined above, if it eventuated, might result in criminal penalties being imposed pursuant to a regulation *validated after* the violations are alleged to have occurred. Such a construction is in conflict with the constitutional safeguards against *ex post facto* laws.

The construction made by the Emergency Court of Appeals is in conflict with the reasoning of this Court in *Yakus* v. *United States*, 321 U. S. 489, 64 S. Ct. 660 (1944). The holding in the *Yakus* case was predicated upon the proposition that the administrative procedure provided by the Act (prior to its amendment by the Stabilization Extension Act of 1944) was fully adequate to a defendant in a criminal case, provided he filed a protest within the applicable time limit provided by the Act. This Court indicated that the decision would be otherwise if it should appear that the manner in which the statute was being administered deprived a defendant in a criminal case, who had filed such a protest, of an adequate opportunity to establish the invalidity of the regulation allegedly violated by him. The construction of the Act made by the Emergency Court of Appeals cannot be sustained without making the Act vulnerable to the grave constitutional objections which were disposed of in the *Yakus* case.

Further reasons here urged for the allowance of the writ may be stated in the language of the dissenting opinion of Judge Laws:

> "I do not agree with the interpretation of the Court that the protest procedure was created by Congress to provide relief against future controls of prices, to the exclusion of other rights and liabilities of individuals. Such rights and liabilities might be of importance equal to, if not greater than, the right to be relieved of price controls. Frequently, a regulation has

interfered with and has stricken down contracts affecting a protestant. In some instances, as in the case before us, enforcement proceedings, in the form of indictments for criminal violation of a regulation, suits to impose treble damages and suits for injunction, have been brought and are pending against a protestant. This Court is in the only forum in which the invalidity of the regulation may be established. If not established in this Court, the possible effect of the invalidity of the regulation upon the rights and liabilities of the protestant may not be passed upon in other courts. The right to protest and obtain judicial review of regulations and orders issued by the Administrators was given for the benefit of individuals. I cannot believe Congress intended to give such benefit in respect only of future controls of prices and exclude the right to protest against past controls which might vitally affect rights and liabilities of individuals. I find nothing in the language of the Emergency Price Control Act of 1942 which so limits the protest and review procedure."

* * * * *

"As I read the opinion of the Court, there is no question but that the right to protest exists except where it has been cut off by a change in the regulation before the protest is filed. The Court seems to indicate that thereafter a filing of a protest is 'untimely'. I disagree with this construction of the Act for several reasons. First, as stated by this Court in *Schanzer* v. *Bowles*[2], there was no time limitation fixed by the Act upon the filing of a protest based on grounds arising, as in this case, more than sixty days after the issuance of a regulation. The majority opinion of the Court, however, has now introduced a new bar to complainant's protest, a bar of which they had no notice from the language of the Act. This bar may be raised at any time, without any notice, by one of the parties to the litigation. Second, the construc-

"2. 141 F. 2d 262 (E. C. A. 1944)."

tion completely obstructs the right of judicial review, in spite of the existence of substantial rights dependent upon such review[3]."

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the United States Emergency Court of Appeals, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that said judgment of the United States Emergency Court of Appeals may be reversed by this Court and the cause be remanded, and for such further relief as to this Court may seem proper.

Dated April 25, 1945.

CLAUDE A. ROTH,
Attorney for Petitioners.

CUMMINGS AND STANLEY,
DAVID L. BAZELON,
JACK H. OPPENHEIM,
JACK JACOBS,
Of Counsel.

"3. It is no answer to state, as the Court does that the provisions of the Stabilization Extension Act provide some right of review in the enforcement action. Such review lies in the discretion of the judge before whom the enforcement action is brought; it is not available as a matter of right. But the important point is that it did not exist under the original Act with whose interpretation we are here concerned."

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 67

THOMAS PAPER STOCK COMPANY, ET AL.,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR PETITIONERS

CLAUDE A. ROTH,
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CUMMINGS AND STANLEY,
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Of Counsel.

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IN THE

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OCTOBER TERM, 1945

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THOMAS PAPER STOCK COMPANY, ET AL.,
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ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 59-81) is reported in 148 F. (2d) 831.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 27, 1945 (R. 83). The petition for a writ of certiorari was filed April 26, 1945, and was granted June 4, 1945 (R. 85). Jurisdiction of this

Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U.S.C. App., Supp. III, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess. (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U.S.C. Sec. 347).

QUESTIONS PRESENTED

1. Whether a protest was not timely filed under Section 203(a) of the Emergency Price Control Act, in a case where no time limitation upon its filing was imposed by the language of the Act; where it attacked the validity of a price regulation retrospectively; and where, although the ground of invalidity had been removed by action of the Price Administrator prior to the filing of the protest, protestant was indicted *after* such administrative action for alleged violations occurring *prior* thereto and during the period of the Regulation's asserted invalidity.

2. Whether the construction of Section 203(a) of the Act by the Court below, as making such a protest untimely, and the construction of 204(a) of the Act, as not permitting judicial review of the Price Administrator's denial thereof, has deprived petitioners of due process of law.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in Appendix I, *infra*, pp. 16-21. The maximum price regulation involved and pertinent amendment thereto appear in the Federal Register (7 F.R. 9732, 8 F.R. 12554).

STATEMENT

On November 21, 1942, the Price Administrator issued Maximum Price Regulation No. 30 establishing specific maximum prices for various grades of wastepaper. So far as here relevant, the Regulation provided that unsorted wastepaper might not be sold to consumers thereof at a price higher than the maximum price prescribed for No. 1 mixed paper.[1]

On July 16, 1943, the Emergency Price Control Act of 1942 was amended by the addition of Section 2(j), the so-called Taft Amendment. Section 2(j) provides that "Nothing in this Act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; * * *." For the purpose of this proceeding it is conceded by the Government that Maximum Price Regulation No. 30 "standardizes" unsorted waste paper and therefore falls within the purview of Section 2(j)(3) of the Act.

On September 11, 1943, the Administrator amended the preamble to Maximum Price Regulation No. 30 by adding the following sentence thereto:

> Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control

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[1] On December 28, 1943, the section involved was amended by Amendment No. 6 (8 F.R. 17483). The amendment made no change relevant to the instant case.

with respect to the commodities subject to this regulation.

This amendment was made by Supplementary Order No. 64,[2] which was accompanied by a statement of the reasons involved in the issuance thereof (R. 31-37). At the same time the Administrator issued a supplementary statement of considerations involved in the issuance of Maximum Price Regulation No. 30 (R. 9-11).

On December 17, 1943, an indictment under Section 205(b) of the Act was returned in the United States District Court for the Northern District of Illinois, alleging that at specified times between July 16 and September 11, 1943, petitioners had made sales of unsorted waste paper at more than the maximum price prescribed by the Regulation. On June 29, 1944, a civil action under Section 205(a) and (e) of the Act was brought against petitioners by the Administrator in the same court, alleging similar violations (R. 52, 59).

On June 15, 1944, petitioners filed a protest against Section 1347.14(d) of the Regulation pursuant to Section 203(a) of the Emergency Price Control Act of 1942, as amended (R. 1-9). It was contended in the protest that Maximum Price Regulation No. 30 was currently invalid. Petitioners further specifically urged that Section 1347.14(d) of the Regulation be declared to have been invalid between July 16, 1943, and September 11, 1943.

On June 30, 1944, the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2d Sess.) became effective, amending the Emergency Price Control Act. This act added to Section 204 of the Emergency Price Control Act a new subsection (e), *infra*, pp. 19-21, which provides (1) for a limited right of defendants in Section 205 pro-

[2] 8 F.R. 12554.

ceedings to secure review of maximum price or rent regulations through a direct complaint to the Emergency Court of Appeals; and (2) for the stay or dismissal of, or vacation of judgment in, actions brought under Section 205 under certain circumstances.

On July 29, 1944, the Acting Administrator issued an order, accompanied by an opinion, denying petitioners' protest (R. 15-29). Thereupon, on August 26, 1944, petitioners filed a complaint with the Emergency Court of Appeals pursuant to Section 204(a) of the Emergency Price Control Act of 1942, as amended, seeking review of the denial of the protest (R. 45-49). The court dismissed the complaint, holding that the contested provision of Maximum Price Regulation No. 30 was currently valid and that the court had no jurisdiction under Section 204(a) of the Act to consider the objection that the provision was invalid during the period July 16 to September 11, 1943, on account of the Administrator's failure to determine during that period that there was no practicable alternative for securing effective price control (R. 59-81).

The judgment of the Emergency Court of Appeals was entered on March 27, 1945 (R. 83). Subsequently, certain proceedings were had in the District Court and in the Emergency Court of Appeals, which were brought to the attention of this Court by letters from the Solicitor General and counsel for petitioners. Since these matters are not a part of the record below, and therefore are not contained in the Transcript of Record, for convenient reference a statement of them is set forth in Appendix II, *infra*, pp. 22-27.

SPECIFICATION OF ERRORS TO BE URGED

The Emergency Court of Appeals erred in the following respects:

1. In refusing to consider whether, and in refusing to declare that, the Regulation protested was invalid during the period July 16 to September 11, 1943.

2. In holding that the Price Administrator was not required to determine whether the Regulation was invalid during the period July 16 to September 11, 1943.

3. In holding that the Emergency Price Control Act prohibits the filing of a protest against a regulation after the claimed ground of invalidity has been "corrected or cured".

4. In holding that the Emergency Court of Appeals is not required to review the denial of such a protest.

5. In holding that a protest filed under Section 203 of the Act, prior to the enactment of Section 204 (d)(1) is affected by the provisions of the latter subsection.

6. By holding that in the case at bar petitioners are afforded due process of law by the provisions of Section 204(e)(1) of the Act.

7. In construing the Act so as to leave it within the discretion of the District Court as to whether or not petitioners should be forced to trial under an *ex post facto* law.

SUMMARY OF ARGUMENT

I.

In a case where no time limitation upon the filing of a protest was imposed by the language of the Act, a protest attacking the validity of a price regulation retrospectively, filed under Section 203(a) of the Act prior to the incorporation of Section 204(e)(1) into the Act, was timely

filed even though the alleged ground of invalidity had been removed by action of the Price Administrator prior to the filing of the protest by a protestant who had been indicted *after* such administrative action for alleged violations occurring *prior* thereto and during the period of the Regulation's asserted invalidity.

II.

The construction of Section 203(a) of the Act by the Court below, as making such a protest untimely, and the construction of 204(a) of the Act, as not permitting judicial review of the Price Administrator's denial of such a protest, has deprived petitioners of due process of law; and such deprivation of due process is not remedied by the provisions of Section 204(c)(1) incorporated in the Act subsequent to the filing of the protest.

ARGUMENT.

I.

The protest under Section 203(a) was timely filed.

Petitioners' protest was filed June 15, 1944, under the provisions of Section 203(a) of the Act. It asserted that the Regulation in question had been invalid during the period July 16 to September 11, 1943, on account of the Administrator's failure to make the determination required by clause (3) of the Taft Amendment. No time limitation upon the filing of the protest was imposed by the language of the Act, since the grounds of protest first arose on July 16, 1943, when the Taft Amendment was enacted, which was more than sixty days after the issuance of the Regulation. *R. E. Schanzer, Inc.* v. *Bowles*, 141 F. (2d) 262 (E.C.A.).

It is conceded by the Government that if petitioners had filed their protest between July 16, 1943, when the Taft Amendment was enacted, and September 11, 1943, when the preamble to the Regulation was amended, they would have been entitled to present in a protest the objection specified, and they would also have been entitled to a judicial determination of the question by the Emergency Court of Appeals, irrespective of any subsequent action by the Administrator. *Montgomery Ward & Company* v. *Bowles*, 147 F. (2d) 858, 861 (E.C.A.).

But the Government contends that petitioners lost their absolute right to judicial review of the validity of the Regulation because at the time of the filing of the protest the Regulation was no longer open to the objection raised in the protest and was therefore "untimely". Under the

circumstances in the case at bar, this contention amounts to saying that the Administrator may promulgate an invalid regulation; that after it has been extant for a period, he may validate it prospectively; that thereafter he may cause a person to be indicted for violations alleged to have occurred during the period when the regulation was invalid, at the same time refusing to entertain a protest then filed attacking the previous invalidity of the regulation—notwithstanding that no time limitation is imposed by the language of the Act upon the filing of the protest.

The reasoning of the Court below, sustaining the Government's contention, is that the failure of the Act to impose any express time limitation upon a protest of the type here in question "does not mean that there is no limitation whatever upon the time within which an objection to a regulation or order must be presented to the Administrator in a protest. On the contrary, as we have seen, the very nature of the protest procedure involves such a limitation." The asserted basis for this proposition is that the Act does not contemplate that the Administrator "may be wholly diverted from his all important administrative task of price control for the sole purpose of performing the unrelated judicial task of determining the effect of past regulations upon the rights and liabilities of private individuals." Thus the Court below introduces a bar to petitioners' protest of which they had no notice from the language of the Act. This construction of Section 203(a) is, we submit, untenable for the reasons stated in the dissenting opinion of Judge Laws:

> I do not agree with the interpretation of the Court that the protest procedure was created by Congress to provide relief against future controls of prices, to the exclusion of other rights and liabilities of individuals. Such rights and liabilities might be of importance equal to, if not greater than, the right to be relieved

of price controls. Frequently, a regulation has interfered with and has stricken down contracts affecting a protestant. In some instances, as in the case before us, enforcement proceedings, in the form of indictments for criminal violation of a regulation, suits to impose treble damages and suits for injunction, have been brought and are pending against a protestant. This Court is the only forum in which the invalidity of the regulation may be established. If not established in this Court, the possible effect of the invalidity of the regulation upon the rights and liabilities of the protestant may not be passed upon in other courts. The right to protest and obtain judicial review of regulations and orders issued by the Administrators was given for the benefit of individuals. I cannot believe Congress intended to give such benefit in respect only of future controls of prices and exclude the right to protest against past controls which might vitally affect rights and liabilities of individuals. I find nothing in the language of the Emergency Price Control Act of 1942 which so limits the protest and review procedure.

In the context of the present case, the protest attacking the validity of the Regulation between July 16 and September 11, 1943, was not, as the Court below asserts, filed "too late to secure any action upon the objection" simply because the objection had already been "cured" as to the future by the Administrator's amending the preamble to the Regulation on September 11. The objection was aimed at the *past* invalidity of the Regulation, and as to this objection the Administrator could still take the action sought by protestant—namely, the dismissal of the enforcement proceedings based upon alleged violations occurring before September 11. Since the Administrator "has wide scope for the exercise of his discretionary power to modify or suspend a regulation pending its administrative and judicial review" (*Yakus* v. *United States*, 321 U. S. 414), a protest directed specifically to the question of law as to when the Regulation under enforcement

became effective—a question of law upon which enforcement policy depended—was filed in time to secure proper administrative action in relation to the pending enforcement proceedings. In making an administrative decision as to whether he should prosecute or dismiss enforcement proceedings based upon past violations, certainty as to the effective date of the Regulation was of first importance to the Administrator, and the proper disposition of the protest was determinative of future action.

The construction of Section 204(a) by the Court below, as not permitting judicial review of the Price Administrator's denial of a protest such as the one here involved, conflicts with the construction given that section by this Court in the *Yakus* case:

> The Emergency Court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings.

The holding in the *Yakus* case was predicated upon the proposition that the statutory administrative procedure (prior to the incorporation of Section 204(e)(1) into the Act) was fully adequate to a defendant in a criminal case, provided he filed a timely protest. But the construction of the Act by the Court below, as Judge Laws pointed out in his dissent, "completely obstructs the right of judicial review, in spite of the existence of substantial rights dependent upon such review."

II.

Petitioners have been deprived of due process of law.

It was indicated in the majority opinion in the *Yakus*

case that the decision would have been otherwise if it had appeared that the manner in which the Act was being administered deprived the defendant in a criminal case, who had filed a timely protest, of an adequate opportunity to establish the invalidity of a regulation he was charged with having violated.

The protest in the case at bar was timely filed insofar as any time limitations were imposed by the language of the Act. But the Court below has introduced a time limitation of which petitioners had no notice from the language of the Act. It was the opinion not only of Judge Laws, in his dissent, that this construction amounted to "such a denial of a reasonable opportunity to be heard as to constitute an offense against the due process clause of the Constitution", but Judge Lindley also, in his concurring opinion, agreed that:

> It may well be that under the facts presented here complainants would have had no remedy as to their second objection before the enactment of the Stabilization Extension Act of 1944 and, thus, as Judge Laws indicates, if our conclusion is correct, would have had cause to assert the deprivation of due process.

Judge Lindley went on to say that "Congress has remedied this situation by incorporating 204(e)(1) into the Act, thereby creating a remedy to which we properly remand complainants."

But reliance upon Section 204(e)(1) simply begs the question. The actual question presented is that of interpreting the protest provisions of the Act as they stood when petitioners filed their protest, which was before the incorporation of Section 204(e)(1) into the Act. The Court below in effect says that the Act, prior to its amendment, must be construed as not having

afforded due process. Such a construction obviously should be avoided unless the language of the Act, as it stood prior to the incorporation of Section 204(e)(1), admitted of no other interpretation. We submit that in the light of the *Yakus* case the language of the Act did not require such an interpretation.

It would seem clear that the addition of Section 204 (e)(1) to the Act brought about no change in the nature of the protest proceeding. The section was added to relieve the situation denounced by Mr. Justice Rutledge in his dissent in the *Yakus* case:

> The statute thus affords the individual, to question a regulation's validity, one route and that a very narrow one, open only briefly. The administrator and others, to enforce it, have many.

The new section gave to the courts in which enforcement actions were brought the right to authorize a defendant to file a complaint in the Emergency Court of Appeals, setting forth any objection found to be made in good faith and with respect to which the Court should find there is reasonable and substantial excuse for the defendant's failure to present such objection in the regular protest procedure provided by Section 203(a). As Judge Laws observes, "Such an added right obviously can have no bearing upon the proper interpretation of the protest procedure of the Emergency Price Control Act of 1942 prior to its amendment."

It would also seem clear that Congress, by adding Section 204(e)(1), did not intend to limit the situations in which the protest procedure provided by Section 203(a) was to be invoked. On the contrary, by surrounding the added rights given by Section 204(e)(1) with specific restrictions, Congress indicated that resort to the relief provided by the new section was to be limited,

and that reliance for relief was to be placed principally upon the protest procedure afforded by Section 203(a).

It should be observed in this connection that simultaneously with the addition of Section 204(e)(1), Section 203(a) was amended so as to remove the sixty-day restriction upon the filing of protests and to provide that a protest might be filed "at any time after the issuance of any regulation". It is ironic that the Government should place reliance upon these liberalizing amendments for the purpose of whittling down the scope of Section 203(a).

Section 204(e)(1) affords no absolute right of judicial review. The review therein provided lies in the discretion of the Court before whom the enforcement action is pending. In the case at bar there was the hazard of possible refusal of the District Court to authorize the filing of a complaint[2a]. Petitioners assert that to be subjected to such hazard is to be deprived of due process of law.

CONCLUSION.

For the foregoing reasons, Sections 203(a) and 204(a) of the Act should be construed as authorizing the filing

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[2a] When petitioners' application to file a complaint under Section 204(e)(1) was heard by the District Court on May 10, 1945, counsel for the Price Administrator objected to the granting of the application upon the ground that more than thirty days had elapsed since the arraignment and that therefore the District Court was not empowered to entertain the application until after judgment. The application was granted, as appears in Appendix II, *infra*, p. 22. The question still remains whether the Emergency Court of Appeals has jurisdiction of the complaint filed pursuant to leave granted under Section 204(e)(1). If it had jurisdiction to review the denial of the protest in the case here under review, then it would seem that the complaint filed under Section 204(e)(1) ought not to be considered as properly filed.

of a protest under the circumstances in the case at bar and as authorizing the Emergency Court of Appeals to review the Price Administrator's denial of such a protest.

WHEREFORE, it is respectfully submitted that the judgment of the Court below should be reversed and the cause remanded with instructions to review, upon the merits, the Price Administrator's denial of the protest insofar as it attacks the validity of the Regulation for the period July 16 to September 11, 1943.

CLAUDE A. ROTH,
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Of Counsel.

APPENDIX I

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., are as follows:

> SEC. 2 (j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.[3]
>
> * * * * * *
>
> SEC. 203 (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*[4] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations

[3] Entire subsection (j) added by sec. 5 (a), Public Law 151, 78th Cong., 1st Sess. (July 16, 1943), 57 Stat. 566.

[4] As amended by sec. 106 of Stabilization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[5] Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[6] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and

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[5] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[6] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part; to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or

in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for

good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under

section 205; setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.[7]

[7] Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

APPENDIX II

1. Following the entry of judgment by the Emergency Court of Appeals on March 27, 1945, petitioners, on April 13, 1945, filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, an application for leave to file a complaint in the Emergency Court of Appeals under Section 204 (e) of the Act. Because of the absence of District Judge Walter J. LaBuy, to whom the case was assigned, the hearing on said application was postponed to May 10, 1945.

2. April 26, 1945, was the last day on which a petition for a writ of certiorari from the judgment of the Emergency Court of Appeals could be filed, and petitioners on that day filed their petition in this Court.

3. On May 10, 1945, while said petition for a writ of certiorari was still pending and undetermined, District Judge Walter J. LaBuy granted leave to complainants to file a complaint under Section 204 (e).

4. On or about May 25, 1945, the brief of the Government in opposition to petition for a writ of certiorari was filed by the Acting Solicitor General, Hugh B. Cox.

5. On May 26, 1945, the Acting Solicitor General sent the following letter to the Clerk of this Court:

May 26, 1945.

Charles Elmore Cropley, Esq.,
Clerk, Supreme Court of the United States,
Washington, D. C.

Re: No. 1206—Thomas Paper Stock Company, *et al.* *vs.* Chester Bowles, Price Administrator.

DEAR MR. CROPLEY:

We have just been advised that in *United States v. Thomas Paper Stock Company*, a criminal case in the United States District Court for the Northern

District of Illinois, referred to in our brief in opposition to certiorari in No. 1206 (p. 4), the District Court on May 10, 1945, granted leave to defendants, petitioners in No. 1206, to file a complaint in the Emergency Court of Appeals pursuant to Section 204 (e) of the Emergency Price Control Act, and that the proceedings in the District Court have been stayed pursuant to the same section.

Will you kindly bring this information to the attention of the Court in connection with its consideration of the petition and brief in opposition in No. 1206. See, particularly, the Government's brief in opposition at pages 7-10.

A copy of this letter is being sent to counsel for petitioners.

Very truly yours,

HUGH B. COX,
Acting Solicitor General.

6. On May 29, 1945, the following reply to the foregoing letter was sent to the Clerk of this Court:

May 29, 1945.

Charles Elmore Cropley, Esq.,
Clerk, Supreme Court of the United States,
Washington, D. C.

Re: No. 1206—Thomas Paper Stock Company, *et al. vs.* Chester Bowles, Price Administrator.

DEAR MR. CROPLEY:

We have received a copy of Acting Solicitor General Cox's letter of May 26, 1945, calling attention to the order entered by the United States District Court on May 10, 1945.

In this connection, we desire to point out that notwithstanding the granting of leave to file a complaint in the Emergency Court of Appeals pursuant to Section 204(e) of the Emergency Price Control Act, the question still remains whether the Emergency Court of Appeals has jurisdiction of such a complaint

in the situation in the case at bar. If, as we contend in the Petition for Certiorari, the Emergency Court had jurisdiction of the complaint filed pursuant to Section 204(a), and should have decided said complaint upon the merits, then it would not have jurisdiction of a complaint filed pursuant to leave granted under Section 204(e).

We also desire to point out that the granting of leave under Section 204(e) in the criminal case affords no relief against the invalidity of the same regulation which is involved in the treble damage action referred to in the Petition for Certiorari.

A copy of this letter is being sent to the Acting Solicitor General.

Yours very truly,

CLAUDE A. ROTH,
Counsel for Petitioner.

7. On June 4, 1945, the petition herein for a writ of certiorari to the United States Emergency Court of Appeals was granted.

8. On August 23, 1945, the Acting Solicitor General sent the following letter to the Clerk of this Court:

August 23, 1945

Charles Elmore Cropley, Esquire,
Clerk, Supreme Court of the
United States,
Washington, D. C.

Re: Thomas Paper Stock Co., *et al.*, v.
Chester Bowles, Price Administrator, No. 67.

DEAR MR. CROPLEY:

I enclose herewith a letter to me from Mr. Richard M. Field, General Counsel of the Office of Price Administration, dated August 22, 1945, directing attention to certain developments affecting the above-entitled case.

As you will observe, Mr. Field's letter points out that subsequent to the granting of certiorari on June

4, 1945, the petitioners have filed in the Emergency Court of Appeals a complaint under Section 204(e)(1) of the Emergency Price Control Act, as amended, pursuant to leave granted by the District Court for the Northern District of Illinois in certain enforcement proceedings therein pending, to which reference was made in the Government's brief in opposition in No. 67 (pp. 4, 7-8). It is also stated that the Emergency Court of Appeals has tentatively set the complaint down for oral argument on September 7, 1945. The letter points out that the issues raised in the pending complaint are identical with those which the Emergency Court of Appeals had declined to consider, for want of jurisdiction, in No. 67, which had reached the Emergency Court of Appeals pursuant to Section 204(a) of the Act. Should petitioners prevail in the case presently pending in the Emergency Court of Appeals, it follows from Section 204(e)(2) that the relief granted would apply to any pending enforcement proceedings, and would be co-extensive with that which would be afforded by a decision in the proceeding under Section 204(a), involved in No. 67.

If, as I believe, Mr. Field is right in stating that a decision by the Emergency Court of Appeals will render moot the question presented in No. 67, concerning the jurisdiction of the Emergency Court of Appeals, the Supreme Court may wish to postpone consideration and disposition of No. 67 until the Emergency Court of Appeals has rendered its decision in the case now before it. To that end I am bringing the matter to your attention.

I am sending a copy of this letter, and of the letter from Mr. Field, to counsel for petitioners.

Sincerely yours,

HAROLD JUDSON,
Acting Solicitor General

Enclosure

Following is the letter from the General Counsel of the Office of Price Administration above referred to:

August 22, 1945.

Hon. Harold Judson
Acting Solicitor General
Department of Justice
Washington 25, D. C.

DEAR MR. JUDSON:

I have recently been informed by your office that the case of Thomas Paper Stock Company, *et al.* v. Chester Bowles, Price Administrator, No. 67 in the Supreme Court, has been set for oral argument for the week of October 15. In this connection I should like to call your attention to certain proceedings now pending in the Emergency Court of Appeals which have a direct bearing upon the proceedings in the Supreme Court.

On June 8, 1945, pursuant to an order entered by the District Court for the Northern District of Illinois, under section 204(e)(1) of the Emergency Price Control Act as amended, a complaint was filed in the Emergency Court of Appeals by Thomas Paper Stock Company and Alvin E. Sandroff, petitioners in No. 67 in the Supreme Court. This complaint seeks a determination that section 1347.14(d) of Maximum Price Regulation 30 was invalid during the period July 16, 1943 to September 11, 1943 under section 2(j) of the Emergency Price Control Act of 1942, as amended, on account of the failure of the Price Administrator to make a determination prior to September 11, 1943 that no practicable alternative existed for securing effective price control with respect to unsorted waste paper. On June 21, 1945, the Price Administrator moved to dismiss the complaint on the ground that the facts alleged are legally insufficient to establish a claim upon which relief can be granted. The briefs in support of and opposition to this motion have already been filed, and the motion has been tentatively set down for oral argument on September 7, 1945.

The issue thus pending in the Emergency Court of Appeals is the identical issue which that Court declined to pass upon when it dismissed in part the complaint in No. 67 on the ground that the protest had

been filed after that particular objection had been obviated by amendment of the preamble of the Regulation. The only question properly involved in the case now pending in the Supreme Court is whether the Emergency Court of Appeals erred in declining to pass on the merits of that objection. However, the merits of the objection are now before the Emergency Court of Appeals in another proceeding between the same parties and will in all likelihood be determined by that Court before case No. 67 has been decided by the Supreme Court. If this should happen, it seems to us that case No. 67 in the Supreme Court would become moot, since a decision that the Emergency Court of Appeals had erred in declining to accept jurisdiction would result only in returning to it for determination a question which would have already been determined by the same court in another proceeding between the same parties.

In view of these circumstances, I wonder whether it would not be appropriate to suggest to the Clerk of the Supreme Court that the oral argument in case No. 67 should be postponed until after a decision by the Emergency Court of Appeals in the case of Thomas Paper Stock Company, *et al.* v. Bowles, No. 232 in the Emergency Court of Appeals.

Respectfully yours,

RICHARD H. FIELD,
General Counsel.

9. On September 7, 1945, the Emergency Court of Appeals heard oral argument on and took under advisement the Price Administrator's motion to dismiss the complaint filed under Section 204(e). The grounds asserted in support of this motion went to the merits of the question which the Emergency Court of Appeals had refused to consider in the case here under review.

FILE COPY

NOV 28 1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 67

THOMAS PAPER STOCK COMPANY, ET AL.,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR.

BRIEF OPPOSING MOTION TO DISMISS ON GROUND OF MOOTNESS.

CLAUDE A. ROTH,
Attorney for Petitioners.

CUMMINGS AND STANLEY,
JACK H. OPPENHEIM,
Of Counsel.

The Schaffer Press, Inc. DEL. VIVI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

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THOMAS PAPER STOCK COMPANY, ET AL.,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR.

BRIEF OPPOSING MOTION TO DISMISS ON GROUND OF MOOTNESS.

This cause, we submit, has not become moot. The reasons advanced by the Government for dismissal will be seen, upon analysis, to be untenable.

The Government, referring to Case No. 232 in the Emergency Court of Appeals, decided October 5, 1945,[1] says:

> Since petitioners have thus secured the relief which their petition for certiorari sought—a determination

[1] A petition for a writ of certiorari seeking review of that case here was filed on November 3, 1945, and is pending as No. 578 at the present term.

by the court below of the merits of certain objections to the pertinent price regulation—the present proceeding has lost its vitality and presents only a moot issue.

Again, the Government says:

> It follows, in our view, that a decision in the proceeding which has now reached judgment on the merits in the Emergency Court of Appeals would have afforded petitioners, if they were successful therein, all the relief which they might have obtained by a decision in the present proceeding.

These conclusions are faulty in view of the actual nature of the decision in Case No. 232 in the Emergency Court of Appeals. The decision (as we have already pointed out in the petition for certiorari, No. 578) is made to turn not simply upon the *merits* of the objection to the Regulation, but equally upon the question of the *timeliness* of that objection. Thus, it was said in the majority opinion in Case No. 232 that because petitioners had not filed a protest under Section 203(a) "during the time it was open to them by protest to question the validity of the regulation", they could not assert "that they were denied due process by failure of the Administrator to make a determination before they violated the regulation".[2]

As the matter now stands, the conclusion of the majority opinion under review in the present case—*i.e.*, that petitioners could obtain the same relief under Section 204(e)(1) as under Section 203(a), has been virtually reversed by the conclusion implicit in the decision in Case No. 232—*i.e.*, that a complaint under Section 204(e)(1) is not as meritorious as a protest under Section 203(a). The Emergency Court of Appeals apparently will not listen to due

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[2] Petitioners, it should be noted, have not been convicted of violating the Regulation.

process objections in a proceeding under Section 204(e)(1), when the objections, in its view, should have been raised at an earlier time in a proceeding under Section 203(a). (The basis for the distinction is not made explicit, and on its face would seem to be illogical.)

Now, the present proceeding originated in a protest filed under Section 203(a). If, as petitioners contend, the protest was properly filed under that section, then certainly *in this case* petitioners cannot be deprived of the right to "raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review". *Yakus* v. *United States*, 321 U. S. 414, 437.

The relief which petitioners seek in the present proceeding, if afforded them, will require the Emergency Court of Appeals to treat the protest filed by petitioners under Section 203(a) as properly filed, and to consider the due process objections to the Regulation which that court—(without justification)—said petitioners would not be heard to assert in Case No. 232.

Of course, we contend that the decision in the latter case is erroneous, and, in its construction of Section 204(e)(1), inconsistent with the same court's decision in the present case. Accordingly we are seeking its review on certiorari (No. 578) and its consolidation with the present case. To deal with the Emergency Court's decisions separately gives rise to unavoidably involved statements and introduces complexities of analysis which can be cut through by consolidating the cases and examining the underlying issues directly.

Some comment is called for by the arguments set forth in the Government's motion to dismiss:

The Government anticipates and seeks to refute "two possible arguments" against the conclusion that this case is moot. The first point anticipated is that there may be a latent jurisdictional defect in Case No. 232 in the Emergency Court of Appeals. In our brief heretofore filed herein, we suggested that the remedies provided by Sections 203(a) and 204(e)(1) are mutually exclusive, and that the latter remedy is intended by the Act to be made available only in cases where the former has—excusably—not been invoked. The fact is that petitioners *did* proceed under Section 203(a). It is only because the court below treated that proceeding as a nullity (as far as affects the question of the regulation's validity from July 16 to September 11, 1943) that petitioners then initiated a proceeding under Section 204(e)(1). The finding of the District Court that there was reasonable and substantial excuse for the petitioners' "failure to present such objection in a protest filed in accordance with Section 203(a)"—upon which the jurisdiction of the Emergency Court of Appeals rests in Case No. 232—obviously will lose all force if this Court decides that petitioners actually did "present such objection in a protest filed in accordance with Section 203(a)".

The District Court's finding, in which Case No. 232 is rooted, merely echoes the Emergency Court's pronouncement in the concluding paragraph of the decision under review in the present case, 148 F. (2d) at page 842. If the Emergency Court's construction of Section 203(a) was erroneous, can the District Court's finding nevertheless stand? That in itself in a question which, we submit, can be answered only by this Court's consideration of the two cases integrally. And if the District Court's finding is conclusive, can the Emergency Court disregard it—as it has done in the decision in Case No. 232—by holding in

effect that petitioners are *not excused* for their "failure to present such objection in a protest filed in accordance with Section 203(a)"?

The Government suggests as a reason for construing Sections 203(a) and 204(e)(1) as being *not* mutually exclusive, the fact that petitioners might have been forced to trial and possibly convicted of violation of the regulation while seeking determination of its validity by the procedure initiated under Section 203(a), which has no stay provisions such as were availed of under Section 204(e)(1). Under these circumstances, the Government says, petitioners "could have no relief against the sentence imposed". This is said to sanction the institution of the proceeding under Section 204(e)(1) notwithstanding the pendency of the protest under Section 203(a). Such a construction of the Act, we submit, is patently contrary to the legislative intent. In our view, the omission to provide for a stay of enforcement proceedings under Section 203(a) similar to the stay apparatus provided by Section 204(e)(1) is an inconsistency which cannot be resolved by such loose interpretation of Section 204(e)(1). Moreover, the construction of Section 203(a) suggested by the Government overlooks what this Court said in the *Yakus* case, 321 U. S. at page 447:

> Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid. * * * Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds.

The "second possible argument against mootness" anticipated in the Government's motion to dismiss concerns the question whether a defendant in a criminal enforcement action, by filing a complaint under Section 204(e)(1), is adequately protected against a possible judgment and execution in a pending treble-damage action growing out of the same transactions covered by the indictment. In this connection, the Government construes Section 204(e)(2)(iii) as affording a stay of execution in the civil case until the final determination of the proceeding instituted under Section 204(e)(1). If such a construction of Section 204(e)(2)(iii) is upheld, then the Government's refutation of the "second possible argument against mootness" must be accepted. We cannot be certain, however, that such construction of Section 204(e)(2)(iii) is the proper one.

CONCLUSION.

It is submitted that in the light of the actual nature of the decision in Case No. 232 in the Emergency Court of Appeals, the present cause has not become moot.

Respectfully submitted,

CLAUDE A. ROTH,
Attorney for Petitioners.

CUMMINGS AND STANLEY,
JACK H. OPPENHEIM,
Of Counsel.

23, 50 U. S. C. App., Supp. III, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess. (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTIONS PRESENTED

1. Whether under Section 203 (a) of the Emergency Price Control Act a protest may properly be filed against a maximum price regulation after the alleged ground of invalidity of the regulation has been removed by action of the Price Administrator.

2. Whether the construction of the Act by the Court below, as not permitting the filing of such a protest, has deprived petitioners of due process of law.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix, *infra*, pp. 15–22. The maximum price regulation involved and pertinent amendment thereto appear in the Federal Register (7 F. R. 9732, 8 F. R. 12554).

STATEMENT

On November 21, 1942, the Price Administrator issued Maximum Price Regulation No. 30 establishing specific maximum prices for various grades of wastepaper. So far as here relevant, the Reg-

ulation provided that unsorted wastepaper might not be sold to consumers thereof at a price higher than the maximum price prescribed for No. 1 mixed paper.[1]

On July 16, 1943, the Emergency Price Control Act of 1942 was amended by the addition of Section 2 (j), the so-called Taft Amendment. Section 2 (j) provides that "Nothing in this Act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; * * *." For the purpose of this proceeding it is conceded that Maximum Price Regulation No. 30 "standardizes" unsorted waste paper and therefore falls within the purview of Section 2 (j) (3) of the Act.

On September 11, 1943, the Administrator amended the preamble to Maximum Price Regulation No. 30 by adding the following sentence thereto:

> Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has

[1] On December 28, 1943, the section involved was amended by Amendment No. 6 (8 F. R. 17483). The amendment made no change relevant to the instant case.

> determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation.

This amendment was made by Supplementary Order No. 64,[2] which was accompanied by a statement of the reasons involved in the issuance thereof (R. 35–41). At the same time the Administrator issued a supplementary statement of considerations involved in the issuance of Maximum Price Regulation No. 30 (R. 10–12).

On December 17, 1943, an indictment under Section 205 (b) of the Act was returned in the United States District Court for the Northern District of Illinois, alleging that at specified times between July 16 and September 11, 1943, petitioners had made sales of unsorted wastepaper at more than the maximum price prescribed by the Regulation. On June 29, 1944, a civil action under Section 205 (a) and (e) of the Act was brought against petitioners by the Administrator in the same court, alleging similar violations. (R. 57, 64; see R. 8.)

On June 15, 1944, petitioners filed a protest against Section 1347.14 (d) of the Regulation pursuant to Section 203 (a) of the Emergency Price Control Act of 1942, as amended. (R. 1–9.) It was contended in the protest that Maximum

[2] 8 F. R. 12554.

Price Regulation No. 30 was currently invalid. Petitioners further specifically urged that Section 1347.14 (d) of the Regulation be declared to have been invalid between July 16, 1943 and September 11, 1943.

On June 30, 1944, the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2d Sess.) became effective, amending the Emergency Price Control Act. This act added to Section 204 of the Emergency Price Control Act a new subsection (e), *infra*, pp. 19–22, which provides (1) for a limited right of defendants in Section 205 proceedings to secure review of maximum price or rent regulations through a direct complaint to the Emergency Court of Appeals; and (2) for the stay or dismissal of, or vacation of judgment in, actions brought under Section 205 under certain circumstances.

On July 29, 1944, the Acting Administrator issued an order, accompanied by an opinion, denying petitioners' protest (R. 17–31). Thereupon, on August 26, 1944, petitioners filed a complaint with the Emergency Court of Appeals pursuant to Section 204 (a) of the Emergency Price Control Act of 1942, as amended, seeking review of the denial of the protest (R. 50–54). The court dismissed the complaint, holding that the contested provision of Maximum Price Regulation No. 30 was currently valid and that the court had no jurisdiction under Section 204 (a) of the

that period on account of the Administrator's failure to publish his determination that there was no practicable alternative, for the purposes of effective price control, to the standardization embodied in the Regulation. If petitioners had filed such a protest, they would also have been entitled, as of right, to a judicial determination of the question by the Emergency Court of Appeals, irrespective of any subsequent action by the Administrator. *Montgomery Ward & Co.* v. *Bowles*, 147 F. (2d) 858, 861 (E. C. A.). For their failure to assert this right, petitioners have no one to blame but themselves. As this Court observed in the *Yakus* case, "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (321 U. S. at p. 444.)

But here, unlike the situation presented in the *Yakus* case, petitioners are not absolutely barred from challenging the validity of the Regulation by reason of their failure to file a protest within the limited time available under the construction of the statute adopted by the court below. Petitioners may still avail themselves of the provisions of Section 204 (e) of the Act, added by the Stabilization Extension Act of 1944, in order to

No. 1206

In the Supreme Court of the United States

OCTOBER TERM, 1944

THOMAS PAPER STOCK COMPANY, ET AL.,
PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 64–78) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 27, 1945 (R. 79). The petition for a writ of certiorari was filed April 26, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat.

Act to consider the objection that the provision was invalid during the period July 16 to September 11, 1943, on account of the Administrator's failure to publish his determination that there was no practicable alternative for securing effective price control. (R. 64–79.)

ARGUMENT

(1) The principal ground asserted for the granting of the writ is that the construction given by the court below to Section 203 (a) and Section 204 (a) deprived petitioners of due process of law by denying them the absolute right to administrative consideration of their protest and judicial review thereof on the merits by the Emergency Court of Appeals. This contention is, we submit, clearly without substance, particularly on the facts here presented and in the light of the decision of this Court in *Yakus* v. *United States*, 321 U. S. 414.

Petitioners have lost their absolute right to judicial review of the validity of the Regulation which they are charged with violating primarily because of their own failure to exercise the rights accorded them by the statute. From July 16, 1943, when the Taft Amendment was first adopted, until September 11, 1943, when the preamble to the Regulation was amended, petitioners were entitled, as of right, under the construction adopted by the court, to present in a protest the objection that the Regulation was invalid during

obtain leave in the enforcement proceedings against them to file a complaint in the Emergency Court of Appeals, challenging the validity of the Regulation during the particular period with which they are now concerned. Indeed, as Judge Lindley pointed out in his concurring opinion in the court below, one of the reasons for the adoption of Section 204 (e), indicated in the legislative history, was the desire of Congress to avoid the question, suggested by the opinion of this Court in the *Yakus* case, "whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid." (321 U. S. at p. 447.) Thus, by amendment of the Act, Congress removed the possibility that the exclusive jurisdiction provisions of the statute, coupled with the statutory time limit upon the filing of protests, might in another context, not passed upon by this Court in the *Yakus* case, raise a serious constitutional issue.

It is true that the statutory limit upon the filing of the protest involved here is not the sixty-day period involved in the *Yakus* case, but the more indefinite period measured by the continued effectiveness of the Regulation. It is also true that the alternative avenue to judicial review, by way of Section 204 (e) (1), is conditioned upon a finding by the district court that the ob-

jections to the validity of the Regulation are urged in good faith and that there is reasonable excuse for the failure to present them in a protest filed before the institution of the enforcement proceedings. But it must be assumed, for the purposes of this discussion, that in the application of Section 204 (e) (1) to situations such as here presented, the length of time that the protest procedure was available will receive appropriate consideration by the enforcement court in determining whether there was reasonable excuse for the defendant's failure to make use of that procedure; and that the discretion of the court to grant or deny leave to file a complaint will, and indeed must, be exercised so as to preserve, at the minimum, the essentials of due process.[3] What this Court said of the protest procedure in the *Yakus* case is equally applicable here to the statutory alternative to the protest procedure embodied in the special complaint procedure of Section 204 (e) (1): "Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petition-

[3] The authority of the district court to grant or deny leave to file a complaint is, of course, not entirely discretionary. Section 204 (e) provides that the court in which enforcement proceedings are pending "*shall* grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a)." (Emphasis supplied.)

ers could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed." (321 U. S. at p. 435.)

We submit, therefore, that petitioners have failed to present a substantial constitutional question which is properly raised on the record now before the Court.

(2) Apart from the alleged constitutional obstacle discussed above, petitioners suggest no reason why the interpretation adopted by the court below is not entirely consistent with the language of Section 203 (a) and the pattern of the statute as a whole. As the court below suggested, any other construction of the statute would lead to the result that a protest could be filed by anyone who had once been subject to a regulation, no longer in effect, at least so long as the protestant might still be subject to penalties for its prior violation. The fact that Section 203 (a) now provides that "At any time after the issuance of any regulation or order * * * any person subject to any provision of such regulation, [or] order * * * may * * * file a protest specifically setting forth objections to any such provision" does not itself support the proposition that such a protest may be filed after the regulation is no longer in effect, or after it has been modified so as to obviate the objection. Being subject to penalties for violation of a superseded

regulation does not mean that one is still subject to the regulation within the meaning of Section 203 (a);[4] the penalties depend not on the continued effect of the regulation, but on the operation of the statute itself. *United States* v. *Hark and Yaffee,* 320 U. S. 531. Furthermore, as the court below said: "The Act * * * does not contemplate that he [the Administrator] may be wholly diverted from his all important administrative task of price control for the sole purpose of performing the unrelated judicial task of determining the effect of past regulations upon the rights and liabilities of private individuals." (R. 69.) Where the sole interest that a protestant can possibly serve by the filing of his protest is protection against imposition of the sanctions of the Act, it seems far more appropriate that he be remitted to proceedings under Section 204 (e) (1), which are more closely geared to the enforcement proceedings themselves.[5]

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[4] Cf. *The Buka Coal Company* v. *Brown,* 133 F. (2d) 949 (E. C. A.), where the Emergency Court of Appeals upheld the Administrator's construction of the phrase "subject to" as used in Section 203 (a) of the Act. This definition, presently appearing in Section 24 of Revised Procedural Regulation No. 1 (9 F. R. 5791), headed "Right to protest" reads "A person is, for the purposes of this revised procedural regulation, subject to a provision of a maximum price regulation only if such provision prohibits or requires action by him, * * *."

[5] Under the provisions of Section 204 (e) (2), a protest filed subsequent to institution of any enforcement proceedings might well be futile in many cases. This section pro-

It remains only to consider the suggestion put forth in Judge Laws' dissenting opinion, and faintly echoed by petitioners, that this construction of the Act should be rejected because save for the addition of Section 204 (e) the Act so construed would have presented a serious constitutional question of due process. This argument ignores the fact that before the amendment embodied in the penultimate sentence of Section 204 (e) (2) a declaration of invalidity would have been ineffective to provide immunity from the consequences of previous violations; thus a protest filed against a regulation no longer in effect could have served no useful purpose, and no constitutional doubt would have been avoided. If there was ever any question that this construction reflected the Congressional intention underlying the original statute, it was resolved by the legislative history of the 1944 amendments and particularly by the evolution of Section 204 (e) itself.[6] Whether or not this effect of the Act in

---

hibits stays of enforcement actions during the pendency of protests filed subsequent to the institution of enforcement actions. Thus often the enforcement action will have been completely terminated before any effective decision could be rendered through the statutory protest and review procedure, as distinguished from the direct complaint procedure authorized by Section 204 (e) pursuant to leave of court.

[6] The Senate Committee on Banking and Currency in discussing Section 107 of S. 1764 (S. Rep. No. 922 on S. 1764, 78th Cong., 2d Sess., p. 13) stated:

its original form would have presented a constitutional issue not foreclosed by the decision of this Court in the *Yakus* case is, of course, now an academic question which can hardly serve as a reason for the granting of the writ. Nor can it now provide a basis for straining the language of Section 203 (a) out of its normal meaning, or for thrusting upon the Administrator a burden which comports so ill with the statute in its present form.

"* * * It also seems clear that if compliance is to be effectively secured while a case involving the validity of a regulation is pending, civil remedies, including the treble-damage provision, should not be nullified by a subsequent determination of invalidity of the regulation. It is, therefore, made explicit in the amendment that the pendency of a protest or a complaint is not to be grounds for delaying a civil proceeding, and also that a judgment of invalidity in the Emergency Court of Appeals is not to be grounds for relief from civil liabilities which have been incurred on account of violations before such determination of invalidity. If civil remedies were not thus left unimpaired by the amendment, it would undermine the fundamental proposition that price and rent regulations must be obeyed even while being litigated, thus jeopardizing one of the principal benefits of the exclusive jurisdiction provisions of the statute."

The Stabilization Extension Act as finally passed extended the retroactive applicability of a determination by the Emergency Court of Appeals to civil, as well as criminal, actions under Section 205 of the Act. Even under the Act as passed, however, Emergency Court of Appeals' determinations of invalidity have no retroactive effect in any respect other than in their applicability to enforcement actions brought under Section 205 of the Act. See footnote 14 to the opinion of the court below (R. 71).

CONCLUSION

The decision below is correct, and does not warrant further review. The petition should be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

MAY 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., are as follows:

SEC. 2 (j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.[7]

* * * * * *

SEC. 203 (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof*

[7] Entire subsection (j) added by sec. 5 (a), Public Law 151, 78th Cong., 1st Sess. (July 16, 1943), 57 Stat. 566.

specified in section 206,[8] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[9] Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[10] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to pre-

[8] As amended by sec. 106 of Stabilization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

[9] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[10] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

sent further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such

objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days

after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals

which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206."

[11] Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

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No. 67

In the Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS PAPER STOCK COMPANY, ET AL.,
PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

MOTION TO DISMISS WRIT OF CERTIORARI ON GROUND OF MOOTNESS

In the Supreme Court of the United States

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MOTION TO DISMISS WRIT OF CERTIORARI ON GROUND OF MOOTNESS

The Solicitor General, on behalf of the Price Administrator, respondent herein, suggests that this cause has become moot, and accordingly moves, under Rule 7 (3), that the writ of certiorari heretofore granted be dismissed.

The petition for certiorari challenged a decision by the United States Emergency Court of Appeals that it lacked authority, in this proceeding, to determine whether Section 1347.14 (d) of Maximum Price Regulation No. 30, issued by the Price Administrator, was valid or invalid during the period July 16 through September 11, 1943 (*Thomas Paper Stock Co. et al.* v. *Bowles*, 148 F. 2d 831 (E. C. A. No. 159)). The petition was granted by this Court on June 4, 1945. There-

after, on October 5, 1945, the Emergency Court of Appeals, in another proceeding hereinafter described brought by petitioners, decided the issues of validity which that court had declined to consider in the present case. For the reasons more fully set out below, it is submitted that the subsequent decision by the Emergency Court of Appeals renders moot the request for relief in the present case in this Court.

The present proceeding originated in the filing of a protest by petitioners, with the Price Administrator, under Section 203 (a) of the Emergency Price Control Act. Upon the denial of the protest, a complaint was filed with the United States Emergency Court of Appeals under Section 204 (a) of the Act. Two objections were raised against the validity of the regulation. The court below held the first of these to be without merit (R. 61–65). The court declined to consider the second objection on the merits for the reason that the alleged defect had been cured on September 11, 1943, before the protest had been filed. Certiorari was sought only as to the latter branch of the decision of the court below. The decision rendered by the Emergency Court of Appeals on October 5, 1945, was entered in a case begun on complaint in that court filed under Section 204 (e) (1), pursuant to leave by the District Court for the Northern District of Illinois in a criminal proceeding against petitioners under Section 205 (b) of the Act. That the issues decided

on the merits in the later case are the same as those which petitioners unsuccessfully sought to have decided in the present case is made clear by the opinion of the court below in the later proceeding (No. 232 in that court):[1]

> This complaint, which has been filed under Section 204 (e) (1) of the Emergency Price Control Act with leave of the United States District Court for the Northern District of Illinois, properly brings to us for consideration the objection of the complainants to Section 1347.14 (d) of Maximum Price Regulation No. 30, Wastepaper, which we held we had no power to consider in connection with their prior complaint filed under Section 204 (a). See *Thomas Paper Stock Co.* v. *Bowles,* 148 F. 2d 831 (1945).

Since petitioners have thus secured the relief which their petition for certiorari sought—a determination by the court below of the merits of certain objections to the pertinent price regulation—the present proceeding has lost its vitality and presents only a moot issue. Cf. *Lewis Publishing Company* v. *Wyman,* 228 U. S. 610; *Brownlow* v. *Schwartz,* 261 U. S. 216; *Smith* v. *Illinois Bell Telephone Company,* 270 U. S. 587, 588–589; *Hudson & Manhattan Railroad Company* v. *Jersey City,* 321 U. S. 755.

[1] Copies of the opinion are being lodged with the clerk. A chronology of the two proceedings is set forth in the Appendix, *infra.*

Two possible arguments might be advanced against the conclusion that no useful purpose could be served by a judgment of this Court in the present case. One is that there may be a latent jurisdictional defect in the proceeding just concluded in the Emergency Court of Appeals, which would lead this Court, if certiorari were sought and granted in that case, to decline to review the decision on the merits. Petitioners have referred to this possibility in footnote 2 (a) to their brief (p. 14):

> The question still remains whether the Emergency Court of Appeals has jurisdiction of the complaint filed pursuant to leave granted under Section 204 (e) (1). If it had jurisdiction to review the denial of the protest in the case here under review, then it would seem that the complaint filed under Section 204 (e) (1) ought not to be considered as properly filed.

It is submitted that the conclusion drawn in the second sentence of this quotation from the petitioner's brief is unwarranted. The District Court, in granting leave to file a complaint directly with the Emergency Court of Appeals, found that the objection to the regulation was "made in good faith" and that there was "reasonable and substantial excuse for the defendants' [petitioners'] failure to present such objection in a protest filed in accordance with section 203 (a)" of the Emergency Price Control Act. See Sec. 204 (e)

(1), which also provides that "Upon the filing of a complaint pursuant to * * * such leave, the Emergency Court of Appeals shall have jurisdiction to * * * set aside * * * the provision of the regulation * * * complained of or to dismiss the complaint." The necessary findings having been made, the jurisdiction of the Emergency Court of Appeals seems clearly established.

Moreover, even if it be assumed that the Emergency Court of Appeals erred in holding, in the present case, that the protest had not been timely filed, it seems clear that the filing of a protest after institution of the enforcement proceeding would not require the denial of an application for leave to file a special complaint. Under Sec. 204 (e) (2) petitioners would not be entitled to a stay of the criminal enforcement proceeding because of the pendency of the protest itself or any judicial proceeding arising therefrom, since the protest was not filed "prior to the institution of the" criminal proceeding (Sec. 204 (e) (2) (ii)). Therefore, had petitioners not filed a direct complaint under Sec. 204 (e) (1), the trial of the criminal enforcement action could not have been stayed.[2] It is possible, and under the facts here

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[2] "* * * Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; * * *" (last sentence of Section 204 (e)).

presented, highly probable, that in the absence of such a stay the criminal proceeding would have gone to judgment before there could be a final determination of the validity of the regulation in the present proceeding. Thus, in the absence of the direct complaint under Sec. 204 (e) (1), if petitioners were convicted in the criminal proceeding, they could have no relief against the sentence imposed. Therefore, even if it be assumed that the protest was "properly filed by the defendant under section 203," it would not follow that the Emergency Court of Appeals was without jurisdiction over the complaint in Case No. 232.

The second possible argument against mootness is perhaps foreshadowed in a letter to this Court, dated May 29, 1945, in which petitioners' counsel stated:

> We also desire to point out that the granting of leave under Section 204 (e) in the criminal case affords no relief against the invalidity of the same regulation which is involved in the treble damage action referred to in the Petition for Certiorari.

We submit that this conclusion is also unwarranted. Under Section 204 (e) (2) (iii) of the Act, a defendant in an enforcement action under Section 205 is entitled to a stay "during the pendency of any judicial proceeding instituted by the defendant under * * * paragraph (1) of this subsection * * * and until the expiration of the time allowed in this section for the

taking of further proceedings, with respect thereto." Thus, if the civil enforcement action had gone to judgment prior to a final determination of the merits in Case No. 232 in the Emergency Court of Appeals, petitioners would be entitled to a stay of execution until final determination of that case by the court below, or by this Court on review.

It follows, in our view, that a decision in the proceeding which has now reached judgment on the merits in the Emergency Court of Appeals would have afforded petitioners, if they were successful therein, all the relief which they might have obtained by a decision in the present proceeding. Since they have in fact secured a decision, albeit unfavorable on the merits, they have received the only relief which could be afforded them by this Court on the writ of certiorari, and it is therefore respectfully submitted that the writ should be dismissed on the ground that the cause has become moot. Cf. *St. Pierre* v. *United States*, 319 U. S. 41.

J. HOWARD MCGRATH,
Solicitor General.

RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

NOVEMBER 1945.

APPENDIX

The following is a chronological statement of the relevant facts:

December 17, 1943—Criminal proceeding under Sec. 205 (b) instituted against petitioners in the United States District Court for the Northern District of Illinois, alleging violations between July 16 and September 11, 1943.

June 15, 1944—Protest filed with the Administrator.

June 29, 1944—Enforcement action under Sec. 205 (a) and (e) instituted against petitioners in the United States District Court for the Northern District of Illinois, alleging violations between July 16, and September 11, 1943.

July 29, 1944—Protest denied by the Price Administrator.

August 26, 1944—Complaint filed in the Emergency Court of Appeals under Sec. 204 (a) seeking review of denial of the protest (E. C. A. No. 159).

March 27, 1945—Complaint in Case No. 159 dismissed by the Emergency Court of Appeals.

May 10, 1945—Leave to file a complaint directly with the Emergency Court of Appeals, under Sec. 204 (e) (1), granted by the court in the criminal action under Sec. 205 (b), and the criminal action stayed pending completion of the complaint proceeding.

June 4, 1945—Writ of certiorari to Emergency Court of Appeals in Case No. 159 granted by this Court.

June 8, 1945—Complaint filed by petitioners with the Emergency Court of Appeals under Sec. 204 (e) (1) (E. C. A. No. 232).

October 5, 1945—Complaint dismissed by the Emergency Court of Appeals in Case No. 232 on the merits.

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v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE PRICE ADMINISTRATOR

OPINION BELOW

The opinion of the United States Emergency Court of Appeals is reported at 148 F. (2d) 831.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 27, 1945 (R. 79). The petition for a writ of certiorari was filed April 26, 1945, and granted June 4, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp.

IV, Sec. 901 (Appendix, *infra*, pp. 22–23), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTIONS PRESENTED

1. Whether under Section 203 (a) of the Emergency Price Control Act a protest may properly be filed against a maximum price regulation after the alleged ground of invalidity of the regulation has been removed by action of the Price Administrator.

2. Whether the construction of the Act by the court below, as not authorizing the filing of such a protest, has deprived petitioners of due process of law.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix, *infra*. The maximum price regulation involved and the pertinent amendment thereto appear in the Federal Register (7 F. R. 9732, 8 F. R. 12554).

STATEMENT

On November 21, 1942, the Price Administrator issued Maximum Price Regulation No. 30 establishing specific maximum prices for various grades of wastepaper. So far as here relevant, the Regulation provided that unsorted wastepaper might not be sold to consumers thereof at a price

higher than the maximum price prescribed for No. 1 mixed paper.[1]

On July 16, 1943, the Emergency Price Control Act of 1942 was amended by the addition of Section 2 (j), the so-called Taft Amendment, 57 Stat. 566. Section 2 (j) provides that "Nothing in this Act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; * * *." For the purpose of this proceeding it is conceded that Maximum Price Regulation No. 30 "standardizes" unsorted waste paper and therefore falls within the purview of Section 2 (j) (3) of the Act.

On September 11, 1943, the Administrator amended the preamble to Maximum Price Regulation No. 30 by adding the following sentence thereto:

> Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Gov-

[1] On December 28, 1943, the section involved was amended by Amendment No. 6 (8 F. R. 17483). The amendment made no change relevant to the instant case.

> ernment agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation.

This amendment was made by Supplementary Order No. 64,[2] which was accompanied by a statement of the reasons for its issuance (R. 35–41). At the same time the Administrator issued a supplementary statement of the considerations involved in the issuance of Maximum Price Regulation No. 30 (R. 10–12).

On December 17, 1943, an indictment under Section 205 (b) of the Act was returned in the United States District Court for the Northern District of Illinois, alleging that at specified times between July 16 and September 11, 1943, petitioners had made sales of unsorted wastepaper at more than the maximum price prescribed by the Regulation. On June 29, 1944, a civil action under Section 205 (a) and (e) of the Act was brought against petitioners by the Administrator in the same court, alleging similar violations (R. 57, 64; see R. 8).

On June 15, 1944, petitioners filed a protest against Section 1347.14 (d) of the Regulation purportedly pursuant to Section 203 (a) of the Emergency Price Control Act of 1942, as amended

[2] 8 F. R. 12554.

(R. 1–9). It was contended in the protest that Maximum Price Regulation No. 30 was currently invalid. Petitioners further specifically urged that Section 1347.14 (d) of the Regulation be declared to have been invalid between July 16, 1943, the date of enactment of the Taft Amendment, and September 11, 1943, the date when the Administrator published a determination under clause (3) of the Taft Amendment, *supra*, p. 3.

On July 29, 1944, the Acting Administrator issued an order, accompanied by an opinion, denying petitioners' protest (R. 17–31). Thereupon, on August 26, 1944, petitioners filed a complaint with the Emergency Court of Appeals pursuant to Section 204 (a) of the Emergency Price Control Act of 1942, as amended, seeking review of the denial of the protest (R. 50–54). The court dismissed the complaint, holding that the contested provision of Maximum Price Regulation No. 30 was currently valid and that the court had no jurisdiction under Section 204 (a) of the Act to consider the objection that the provision had been invalid during the period July 16 to September 11, 1943, on account of the Administrator's failure to publish his determination that there was no practicable alternative for securing effective price control (R. 64–79). This decision is the subject of the present review on certiorari.

Meanwhile, on June 30, 1944, the Stabilization Extension Act of 1944 (Public Law 383, 78th

Cong., 2d Sess.) became effective, amending the Emergency Price Control Act. This act added to Section 204 of the Emergency Price Control Act a new subsection (e), *infra*, pp. 23–25, which provides (1) that defendants in enforcement proceedings under Section 205 may secure review of maximum price or rent regulations through a direct complaint to the Emergency Court of Appeals on a showing of good faith and reasonable excuse for failure to file a protest earlier; and (2) for the stay or dismissal of, or vacation of judgment in, actions brought under Section 205 under certain circumstances. On June 8, 1945, petitioners filed in the Emergency Court of Appeals a complaint under Section 204 (e) of the Act, pursuant to leave granted on May 10, 1945, by the Federal District Court for the Northern District of Illinois, Eastern Division, in Case No. 43 Cr. 735. On July 21, 1945, respondent filed a motion to dismiss this complaint. Oral argument was heard on September 7, 1945, following the denial of petitioners' motion to stay the proceedings until after final decision of the present case in this Court, and on October 5 the Emergency Court rendered a judgment dismissing the complaint on its merits, holding that the enactment of the Taft Amendment did not invalidate Maximum Price Regulation No. 30 pending the Administrator's determination made September 11, 1943. Certio-

rari has been granted to that decision in *Thomas Paper Stock Co. and Alvin E. Sandroff* v. *Bowles*, No. 578, this Term, set for argument with the present case. The prior refusal of the Emergency Court of Appeals to take jurisdiction of the same issue in the proceeding below is the only question presented by the present case.

Subsequent to the decision by the Emergency Court of Appeals disposing of the merits of petitioners' objections to the validity of the regulation, respondent filed a motion to dismiss the writ of certiorari in the present case on the ground of mootness. On January 2, 1946, this Court ordered that further consideration of the motion be postponed to the oral argument of this case.

SUMMARY OF ARGUMENT

I

The writ of certiorari should be dismissed for the reason that this cause has now become moot. By means of the procedures established under Section 204 (e) of the Act, petitioners have obtained from the Emergency Court of Appeals, and may now obtain from this Court, a determination of the issue which they sought to present by the filing of a protest with the Price Administrator. Consequently, petitioners have already obtained all the consideration which could be accorded to their contention in the instant proceeding.

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II

The construction given to Section 203 (a) of the Emergency Price Control Act by the court below does not deprive petitioners of due process of law. Ample opportunity to secure judicial review of objections to the price regulation is afforded under the statute by the right to file a protest prior to removal of the alleged ground of invalidity and by the procedure, of which petitioners have availed themselves, for securing leave in an enforcement action to file a complaint with the Emergency Court of Appeals. Petitioners' contentions are based on hypothetical and improbable situations, not here presented, which do not show violation of constitutional guaranties.

III

The Emergency Price Control Act does not authorize the filing of a protest solely for the purpose of securing a determination as to the past validity of a regulation. This construction of the Act is required both by the language of the statute and by the entire plan for the administration and review of price regulations. The appropriate and exclusive remedy for one who, by reason of an enforcement action, is concerned solely with the past validity of a price regulation, is the procedure prescribed in Section 204 (e) of the Act.

ARGUMENT

I

THIS CASE HAS BECOME MOOT AND THE WRIT SHOULD BE DISMISSED BECAUSE ITS SOLE PURPOSE, NAMELY OBTAINING REVIEW OF THE VALIDITY OF THE CHALLENGED PRICE REGULATION, HAS BEEN SERVED BY THE PROCEEDING BROUGHT BY PETITIONERS PURSUANT TO SECTION 204 (e) OF THE EMERGENCY PRICE CONTROL ACT, AS AMENDED

The respondent's argument upon this point is contained in his motion to dismiss (see *supra*, p. 7), to which the Court is respectfully referred.

II

THE CONSTRUCTION GIVEN TO SECTION 203 (a) OF THE EMERGENCY PRICE CONTROL ACT BY THE COURT BELOW DOES NOT DEPRIVE PETITIONERS OF DUE PROCESS OF LAW

Petitioners' basic contention is that the Emergency Price Control Act as interpreted by the court below denies to persons charged with violation of maximum price or rent regulations an unconditional right to judicial review of the validity of the regulations and therefore contravenes the due process clause of the Fifth Amendment. The abstract nature of this contention is illustrated by the fact that petitioners have now obtained from the Emergency Court of Appeals, in the proceeding under Section 204 (e) (1) of the Act, a determination of the substantive issue

which they sought to raise by filing the protest in this case with the Price Administrator. This fact emphasizes more effectively than extended argument could do that petitioners' objection is not that the statute as interpreted by the court below has actually deprived them of the right to judicial review of a regulation which they are charged with having violated, but rather that in some situations, not here presented, it may have that effect.

This Court has already had occasion, in *Yakus v. United States*, 321 U. S. 414, to pass upon a similar objection to the provisions of the Emergency Price Control Act of 1942, before the liberalizing amendments in the Stabilization Extension Act of 1944. Under the statute as it then stood, the only avenue to judicial review of a price or rent regulation was through the protest procedure of Section 203 (a), access to which was limited to sixty days from the issuance of the regulation except as to grounds of objection arising more than sixty days after the issuance of the regulation. This Court held that a defendant in a criminal proceeding, who had not attempted to file a protest against the regulation which he was charged with having violated, was not deprived of due process of law because he could not challenge the validity of the regulation in the criminal proceeding. After observing that the Emergency Price Control Act was "unlike most

penal statutes and regulations whose validity can be determined only by running the risk of violation," this Court concluded that there was "no principle of law or provision of the Constitution which precludes Congress from making criminal violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity * * *" (321 U. S. at 444).

Petitioners have not been denied an opportunity to contest the validity of the regulation, nor is it likely under the Act that anyone who diligently seeks a determination of the validity of a regulation could be penalized for its violation without having such an opportunity. Even before the direct complaint procedure was added to the Act, petitioners could have secured full review through the protest procedure which was available to them between July 16 and September 11, 1943, when the alleged violations occurred. It is true that the period would have been shorter if the administrative action removing the basis of objection had been taken earlier; but the opportunity would have been afforded as long as it was needed to test a regulation which continued to threaten petitioners. The only threat remaining after the removal of the objection to the regulation was that of a possible enforcement proceeding based upon the regulation in its prior form; and the opportunity to meet this threat if it should materialize was provided in Section 204 (e), of which

petitioners have availed themselves and which has procured full consideration for their contention in the Emergency Court and will produce a decision upon it in this Court.

Nor is it an objection that petitioners might, possibly erroneously, have been denied leave to file a complaint under the terms of Section 204 (e) (1) on the ground that they had failed to establish good faith or substantial excuse for not having filed a protest. This is a hypothetical objection comparable to possible deficiencies in the protest procedure which this Court dismissed as irrelevant in the *Yakus* case, on the ground that it had not been shown that they were the necessary effect of the statute or that, if they did occur, there would not be adequate means of securing judicial relief. If a district court should refuse to grant leave to file a complaint in the Emergency Court of Appeals in a meritorious case, the defendant could properly assign that refusal as error in the enforcement proceeding and make it the basis of appeal to the Circuit Court of Appeals and, if need be, of a petition for review in this Court. *United States* v. *Horns,* 147 F. (2d) 57, 59 (C. C. A. 3). We submit that no further remedy is necessary.

III

THE COURT BELOW WAS CORRECT IN INTERPRETING THE EMERGENCY PRICE CONTROL ACT AS NOT PERMITTING THE FILING OF A PROTEST SOLELY FOR THE PURPOSE OF SECURING A DETERMINATION AS TO THE PAST VALIDITY OF A REGULATION

In so far as petitioners' argument raises a question of statutory construction, it runs counter to the entire plan established by the Act for the administrative and judicial review of price regulations. The gravamen of the decision of the court below is that the protest and judicial review provisions of the Act do not contemplate the imposition upon the Price Administrator of the burden of considering objections to regulations issued by him after the basis of objection has been removed by amendment or supersession of the regulation. The reasons why we contend that the construction placed upon the Act by the Emergency Court of Appeals is correct are more fully set forth in the Price Administrator's brief in *Collins et al.* v. *Bowles,* No. 393, this Term. They will be summarized briefly here.

As this Court observed in the *Yakus* case, *supra,* Congress sought to meet the grave danger of wartime inflation "by a practicable and expeditious means which would operate with such promptness, regularity and consistency as would minimize the sudden development of commodity price disparities" (321 U. S. at p. 432). The method adopted was a single procedure for review "beginning

with an appeal to the Administrator's specialized knowledge and experience * * * and affording to him an opportunity to modify the regulations and orders complained of before resort to judicial determination of their validity" (p. 433). The statutory requirement that objections must be presented to the Administrator before they may be considered by the Emergency Court of Appeals; the authority given to the Administrator to modify a regulation even while a complaint involving its validity is pending before the court; and the numerous provisions designed to assure prompt action by the Administrator (sections 204 (a), 203 (a), (d) of the Act), all point clearly to the conclusion that the protest procedure was designed for the purpose of securing review of regulations which are currently controlling business transactions. The provision in Section 203 (a) that only a person "subject to any provision of [a] regulation" has the right to "file a protest specifically setting forth objections to any such provision" evidences the same governing principle, for the natural meaning of the quoted language is that the provision to be challenged must regulate the business operations of the challenger at the time he files his protest.[3]

[3] Because of the peculiarity of the substantive objections in this particular case, petitioners are still subject to the body of the same regulatory provisions to which they were subject before the Administrator removed the ground of their objection by amending the preamble and the statement of con-

Consideration of the magnitude of the Administrator's task of continuously modifying regulations in order to increase their effectiveness and relieve persons subject to them of unwarranted hardship, emphasizes the unreasonableness of construing the statutory plan to require the Administrator also to assume the burden of reconsidering provisions which have been superseded. See the Administrator's brief in *Collins et al.* v. *Bowles, supra,* and in *Utah Junk Co.* v. *Bowles,* No. 400, this Term.

The changes in the review procedure effected by the Stabilization Extension Act of 1944 reinforce the conclusion that protests may not be filed after the objection has been cured. As explained above, new subsection (e) to Section 204 provides a special method by which a defendant in an enforcement proceeding may obtain from the Emergency Court of Appeals a decision as to the

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siderations accompanying the regulation. Petitioners' argument would apply equally, however, if the curative action were a change in the substance of the regulation.

If it is petitioners' theory that they remain "subject to" the regulation so long as they are liable to penalties for its violation, they ignore the distinction, clearly pointed out by this Court in *United States* v. *Hark*, 320 U. S. 531, between the operation of the regulation and the continuing effect of the statute itself. Having violated the regulation, the petitioners, by virtue of Section 4 (a) of the Act, became subject to statutory penalties; and their liability continues until cut off by the applicable statute of limitations. This fact does not render them "subject to" the regulation within the ordinary meaning of those words.

validity of a superseded regulation which, if favorable to them, provides a complete defense to the enforcement proceeding. This method is available only upon a showing to the enforcement court that the application is made in good faith and that there was a reasonable excuse for failure to file a protest before the commencement of the enforcement action. To allow the filing of protests after elimination of the basis of objection would nullify the limitations imposed by Congress upon the availability of the procedure provided in Section 204 (e) (2).

Moreover, to allow the filing of protests after correction of the objections would make the availability of the defense of invalidity depend upon the fortuitous completion of the protest and review procedure before final judgment in the enforcement proceeding. Section 204 (e) (2) prohibits the stay of an enforcement action because of the pendency of a protest filed after its commencement. Consequently, the construction here urged by petitioners would cause the outcome in certain cases to depend upon the time factor in two parallel proceedings.

CONCLUSION

We submit, in view of the foregoing, that the present structure of the Emergency Price Control Act, as well as its original plan for the review of price regulations, requires the conclusion that protests may not be filed under Section 203 (a)

after the grounds of alleged invalidity have been removed by administrative action.

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FEBRUARY 1946.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. Supp. IV, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by Public Law 108, 79th Cong., 1st Sess., are as follows:

SEC. 2 (j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.[1]

* * * * *

SEC. 203 (a) *At any time after the issuance of any regulation or order under sec-*

[1] Entire subsection (j) added by sec. 5 (a), Public Law 151, 78th Cong., 1st Sess. (July 16, 1943), 57 Stat. 566.

tion 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,[2] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[3] Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[4] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for

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[2] As amended by sec. 106 of Stabilization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

[3] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[4] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall

be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an

order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

* * * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price

schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 *of this Act or section 37 of the Criminal Code*[3] involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated *or conspired to violate*.[3] The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or

[3] Italicized provisions added by Public Law 108, 79th Cong., 1st Sess.

directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code*[*] involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 *of this Act or section 37 of the Criminal Code,*[*] setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judg-

[*] Italicized provisions added by Public Law 108, 79th Cong., 1st Sess.

ment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code,*[7] nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.[8]

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[7] Italicized provision added by Public Law 108, 79th Cong., 1st Sess.

[8] Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

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SUPREME COURT OF THE UNITED STATES.

Nos. 67 and 578.—October Term, 1945.

Thomas Paper Stock Company, et al., Petitioners, vs. Paul A. Porter, Price Administrator.	On Writ of Certiorari to the United States Emergency Court of Appeals.
Thomas Paper Stock Company, et al., Petitioners, vs. Paul A. Porter, Price Administrator.	

[April 22, 1946.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Having been charged with violations of a price regulation, petitioners challenged its validity before the Emergency Court of Appeals by two different modes in two separate actions. The claim of invalidity in both proceedings was based on the Taft Amendment to the Price Control Act. Adjudication of this claim will dispose of both cases without consideration of procedural issues raised before the Emergency Court.

Thomas Paper Stock Company, a dealer in paper scrap, and its president were indicted under § 205(b) of the Emergency Price Control Act, 56 Stat. 23, 33; 50 U. S. C. § 925(b) for the sale of wastepaper in violation of Maximum Price Regulation No. 30, 7 Fed. Reg. 9732 (Nov. 24, 1942). Section 1347.14(d) of that regulation fixed the maximum price for unsorted wastepaper in terms of a specification or standard. *Id.* at 9735. On similar allegations, the Administrator later began an action against petitioners for treble damages. § 205(e), 56 Stat. 23, 34; 50 U. S. C. App. § 925(e). Both proceedings involved sales of wastepaper between July 16, 1943 and September 11, 1943. The dates are crucial. July 16, 1943 is the effective date of the Taft Amendment, the proper construction of which is the controlling issue. On September 11, 1943, the Administrator, by an amendment to the Maximum Price Regulation No. 30 "determined" that "no practicable alternative exists for securing effective price

control" with respect to such wastepaper except through the standardization defined in the pre-Taft Amendment Maximum Price Regulation No. 30. 8 Fed. Reg. 12554 (Sept. 14, 1943). The problem before us is whether, after the Taft Amendment sales of wastepaper were governed by a maximum price based on a standard, prior to the determination by the Administrator on September 11, 1943 that there was no practicable alternative to such standardization.

And so we turn to the Taft Amendment. It added subsection (j) to § 2 of the Emergency Price Control Act. The relevant provisions of the Taft Amendment are these:

> "(j) Nothing in this act shall be construed . . . (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency." 57 Stat. 566; 50 U. S. C. App. § 902(j).

We agree with the Emergency Court that Congress thus provided "three alternative situations in any one of which [the Administrator] is authorized to employ specifications or standards in connection with price control." *Thomas Paper Stock Co.* v. *Bowles*, 148 F. 2d 831, 835. Thus, in the case of wastepaper, standardization is permitted under Clause (3) of the Amendment although the Administrator may define a standard which "had not previously been used by the wastepaper industry or required by another Government agency." *Id.* at 837. But we are also of opinion that beginning with July 16, 1943, the day the Taft Amendment came into force, it precluded standardized commodity prices unless and until the Administrator "determined" that no other method of price control was practicable. The terms of the Amendment, in the circumstances of its setting, see, *e. g.*, H. R. Rep. No. 697, 78th Cong., 1st Sess. (1943), bring us to this conclusion, but we need add little to the full discussion the Taft Amendment received in the opinion of the Court and that of the dissent below. *Thomas Paper Stock Co.* v. *Bowles*,

153 F. 2d —. For us the decisive consideration is that the Amendment was a rigorous limitation upon the powers of the Administrator based upon the Congressional view that standardizations outstanding at the time the Taft Amendment was passed had not been authorized by the more general language of the original Act. § 2(h), 56 Stat. 23, 27; 50 U. S. C. App. § 902(h).[1] Accordingly, Congress laid down a specific requirement for the validity of prices based on standards, and a fair reading of the Amendment in the light of its history requires that the Administrator must indicate that he has fulfilled this requirement. See *United States* v. *B. & O. R. R. Co.*, 293 U. S. 454. It would hardly satisfy the restriction which the Taft Amendment placed upon the Administrator's power to standardize to allow him to continue situations which, as Congress thought, needed correction.

In signing the joint resolution containing the Taft Amendment, the President did so with the understanding that it "preserved the power in the Administrator to 'standardize' a commodity in any case on which this was absolutely essential to an effective system of fixing prices." See Statement of Price Administrator's Reasons Involved in the Issuance of Supplementary Order No. 64 (Sept. 11, 1943). Congress thus gave power to standardize; it did not stereotype past standardizations. With entire candor the Administrator conceded here that he "had many regulations outstanding which required re-examination in the light of the terms of the Taft Amendment." But although the Amendment apparently had the acquiescence of the Administrator, it contains no saving clause that all outstanding standardizing regulations were to be deemed continuingly valid, nor is there any intimation warranting such an implied limitation. The court below seemed to recognize the duty of a manifested determination by the Administrator of the need for a standardized price by suggesting that the Administrator showed "reasonable promptness" in making the determination applicable to wastepaper within two months after the Taft Amendment. But Congress did not sanction standardization for what we may deem a reasonable period after the enactment of the Taft Amendment without the Administrator's determination of its need.

[1] "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

This is too substantial a qualification to be made by judicial interpolation. Nor can we draw on broad arguments about inflationary pressures on price control in construing legislation dealing with so technically confining a provision as that of the Taft Amendment. The legislation was too specifically directed against prior unauthorized regulations, promulgated no doubt with the best of motives in the great effort against inflation, for us to give it a meaning other than that which the language in the context of its history yields. Of course, all provisions of the Emergency Control Act are infused by its far-reaching aims. But the accommodation of the various interests involved in a system of price control are for Congress and not for us, and we must construe its legislation as fairly as we can to catch the will behind the words. That the construction we have placed upon the Taft Amendment does not touch the vital forces in price control is indicated by the Government's opposition to a review of this litigation on the ground that it was devoid of much practical significance.

It only remains to unsnarl the complicated procedures by which the petitioners sought to establish the invalidity of the regulation which they were charged with violating. On June 15, 1944, petitioners filed a protest against § 1347.14(d) under § 203(a) of the Act. 56 Stat. 23, 31, 58 Stat. 632, 638; 50 U. S. C. App. § 923(a). By this time, as has been noted, the Administrator had amended the regulation to conform in terms with the Taft Amendment. The Administrator denied the protest on the merits and also expressed doubt as to his power to consider the validity of a regulation of which the alleged defects had been cured. The Emergency Court of Appeals sustained the Administrator on the ground that a corrected regulation bars protest. *Thomas Paper Stock Co.* v. *Bowles*, 148 F. 2d 831. We then brought the case here as one of a series of cases raising important issues in the enforcement of the Emergency Price Control Act, 326 U. S. —.

In the meantime petitioners invoked § 204(e) of the Act, 58 Stat. 632, 639; 50 U. S. C. § 924(e), whereby they sought leave to file a complaint directly with the Emergency Court. The District Court, before which the criminal prosecution was pending, granted such leave pursuant to § 204(e). The Emergency Court then passed on the merits of the claim of the invalidity of the regulation in controversy between the date of the Taft Amendment

and September 11, 1944, when in Supp. Order 64, 8 Fed. Reg. 12554, the Administrator determined the necessity for standards. That court, as we have seen, held that the old regulation survived the Taft Amendment. *Thomas Paper Stock Co.* v. *Bowles*, 153 F. 2d —, and we granted *certiorari*, 326 U. S. —.

It is this latter judgment, in No. 578, that we now reverse with the result that disregard of the regulation based on standardized prices for wastepaper not "determined" by the Administrator prior to September 11, 1943, does not subject petitioners to the penalties of the Price Control Act. In view of disposition in No. 578 of the merits of petitioner's claim of invalidity under the Taft Amendment it would be futile to decide the issue on which judgment went in No. 67. Accordingly, the writ of *certiorari* issued in No. 67 will be ~~vacated~~ dismissed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice BLACK, dissenting.

The judgment which the Court just rendered permits this appellant and others to keep profits obtained from sales made at inflationary prices expressly prohibited by Maximum Price Regulation No. 30. That Regulation establishes dollar and cent ceiling prices for thirty-two grades of wastepaper defined by the Price Administrator. It is the type of regulation, of which there have been many, which controls prices by first standardizing or grouping similar commodities, and then fixing one and the same maximum price for each of the commodities in a particular classification. On July 16, 1943, long after Regulation No. 30 was promulgated and fully in force, Congress added the Taft Amendment, (Section 2(j)) to the Emergency Price Control Act of 1942. The Court holds that Congress intended by this amendment to invalidate automatically Price Regulation No. 30, and all the numerous regulations like it, until such time as the Price Administrator should find it possible, amidst all his pressing duties, to investigate and make determinations, formally expressed in writing, that only by standardizing or grouping certain commodities could price control over them be successfully enforced. Since the task of rechecking all past regulations which contained standardization provisions was very great, the Admin-

istrator did not find time to reach the Regulation here involved until two months after the Amendment's enactment. The Court holds that during this interval the public had no protection whatever from inflationary prices prohibited by this Regulation. In my opinion this holding finds support neither in the Section's language nor its legislative history.

When the sponsor of the Taft Amendment offered it on the Senate floor his statement clearly indicated that it grew out of cooperative effort between the legislators and the Price Administrator, who certainly would not be interested in throwing a monkey-wrench into O. P. A.'s enforcement of the existing regulations. Referring to provisions of the Act which his Amendment was intended to clarify, Senator Taft said: "Price Administrator Brown came before the committee and urged that it would seriously hamper his price regulations in a number of trades, regulations for which had already been issued, to many of which there was no objection. He submitted another form of amendment, carrying out the same purpose, but making it perfectly clear that it would not interfere with those regulations, which are proper." Cong. Rec. July 6, 1943, Vol. 89, p. 7251.

In spite of this clear declaration on the part of Senator Taft of his intention to save "proper" existing regulations, the Court now gives the Taft Price Administrator Amendment a meaning which does "interfere with those regulations." It not only interferes with them; it completely destroys their effectiveness for an indefinite interval of time. These appellants and others are wholly freed from any possible penalty for deliberate inflationary overcharges, forbidden by Congress, during the period between the passage of the Amendment and the Administrator's publication of his determinations. That the Regulation here involved was a "proper" regulation on the day the Taft Amendment was passed is conceded. That its standardization provisions were at all times necessary to the effective enforcement of the Act is shown both by the Administrator's later findings and by his original promulgation. Consequently, it is this Court, and not the Congress, which must take the responsibility for permitting appellants to violate the price regulation with impunity.

Furthermore, the Taft Amendment's language offers no support for the Court's decision. For by its terms it neither repeals nor renders unenforceable or ineffective valid outstanding regu-

lations which standardize commodities. And in addition to what has already been pointed out, the prevailing circumstances at the time of its enactment make it highly improbable that Congress intended such a result. At the time the Amendment was enacted the threat of inflation was the greatest since the outbreak of the war. Just in April the President had thought it necessary to issue his well-known "Hold-the-Line Order" in order to tighten controls designed to stem the inflationary trend. Purchasing power was very great and consumer goods had become extremely scarce. Had Congress really intended to protect the public against inflation, as its legislation shows it did, it would not have chosen this time for relaxing government controls. The giving of free reign to inflationary pressure was likely to endanger seriously our economy and to bring great hardship to many individuals. I cannot, without a clear declaration to that effect with respect to any part of our economy, impute to Congress an intent to let inflation run riot during such critical times. I cannot conclude, therefore, as the opinion of the Court necessarily does, that Congress intended to suspend all Maximum Price Regulations containing standardization provisions until the Price Administrator reviewed them.

What then was the purpose of Congress in enacting the Taft Amendment? The Managers on the part of the House thus stated the Section's purpose in the Conference Report on the Amendment: It "is to meet the objection that the Price Administrator has exceeded *the limitations expressed* in section 2(h) of . . . [the 1942 Price Control Act] . . . in issuing certain regulations already promulgated." (Italics supplied.) Section 2(h) provides: "The powers granted . . . shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, *except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.*" (Italics supplied.) As the Conference Report indicates, the Taft Amendment actually added little new, if anything at all, to the requirements already contained in Section 2(h). It was merely an explanation and elaboration of one phase of the requirements of Section 2(h). Any regulation, including the one here held invalid, that was promulgated when Section 2(h) was in effect had to meet its requirements. As later explained by the Taft

Amendment, the requirements of 2(h) which permitted the Administrator to require changed business practices to prevent "circumvention or evasion," included, in the case of regulations containing new standardization provisions, a determination that there was no practical alternative to effective price control. All standardization provisions, including the one here held invalid, in order to be valid under the old Section 2(h) had to be based on such a determination. The Taft Amendment was not, as the Court now holds, a declaration by Congress that all past standardization provisions had not been based on such a determination and that they were therefore invalid. Here the Regulation in question was promulgated while Section 2(h) was in full force and effect. Not only did petitioners fail to show that the Regulation was not based on the determination required by 2(h) as explained by the Taft Amendment, but the Administrator, after the Amendment was enacted, and before any proceedings were brought against petitioners, double checked the Regulation to make sure that it was based on the determination required. It is not denied, and apparently cannot be denied, that it was absolutely necessary for the Administrator to order these changed standardization practices in order to prevent circumvention or evasion. In my opinion, therefore, the wastepaper provisions of Maximum Price Regulation No. 30 were valid at all times, since they met the requirements of Section 2(h) as explained by 2(j). I would affirm the judgment below, which dismissed the complaint.

Mr. Justice DOUGLAS and Mr. Justice MURPHY join in this dissent.